2010

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Hofstra Labor and Employment Law Journal

Volume 28 | Issue 1 Article 3

2010

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*Daniel P. O'Gorman**

Arthur Linton Corbin famously remarked that courts, when deciding contract cases involving the defense of impossibility or impracticability of performance,[1] should "pray for the wisdom of Solomon."[2] This is particularly true when the event causing non-performance is labor activity. For example, Samuel Williston observed that courts have not been entirely consistent on whether such activity excuses non-performance.[3] And although the First Restatement of Contracts included an illustration providing that a manufacturer's breach was not excused because of a strike at its factory,[4] the Second Restatement of Contracts omitted the illustration.[5] E. Allan Farnsworth, the Restatement Reporter for the chapter on impracticability and

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1. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 112, at 728 (4th ed. 2001) ("[T]he modern doctrine of impossibility of performance is often referred to as the doctrine of impracticability.").

2. 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1333, at 372 (1962). Professor John D. Wladis stated that such cases "can be exquisitely difficult to decide." John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575, 1575 (1987).

3. 6 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 1951A, at 5466 & n.8 (rev. ed. 1938); *see also* 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 77:92, at 577 (4th ed. 2004) ("Whether a strike affecting the means of performance constitutes impracticability is not readily answered by case law.").

4. RESTATEMENT (FIRST) OF CONTRACTS § 461 illus. 7 (1932).

5. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 reporter's note, cmt. d (1981).

frustration of performance, explained that the illustration had been omitted "because the parties often provide for this eventuality and, where they do not, it is particularly difficult to suggest a proper result without a detailed statement of all the circumstances."[6]

This article addresses whether such cases are not only difficult because they depend on each case's particular circumstances, but because whether to excuse a party's non-performance due to labor activity often involves issues of federal labor policy.[7] This intersection of contract doctrine and federal labor policy is an area that has been neglected by both contract scholars and labor law scholars. When considering the contract doctrine of impracticability, contract scholars devote little attention to whether such cases affect areas of concern outside of contract law. When considering federal labor policy, labor law scholars generally only consider unions' and employers' rights and duties under the National Labor Relations Act ("NLRA" or "Act"),[8] as amended, and fail to take into account that the common-law contract rights of employers and third parties can play an important role in federal labor policy. Although the issue of labor activity excusing the non-performance of a contract duty might currently arise less often than in the past because of the decrease in union density, the increasing receptiveness of courts over the twentieth century to the excuse of impracticability, coupled with Congress's decision to remove authority of the federal courts and states over labor matters, invites a clash between state contract law and federal policy.

The first part of this article addresses the contract doctrine of impossibility or impracticability of performance. The second part addresses unions' and employers' rights and duties under federal labor law and, in particular, those rights and duties that could be affected by the contract doctrine of impossibility or impracticability of performance. The third part reviews a sample of representative cases involving labor activity and the doctrine of impossibility or impracticability of performance. The fourth part addresses how the doctrine of impossibility or impracticability should be applied in cases involving labor activity, and concludes that courts should generally not consider federal labor policy because Congress intended such policy to be made by the National Labor Relations Board ("NLRB").[9] The fourth part also

6. *Id.*

7. *See* WILLISTON & LORD, *supra* note 3, § 77:92, at 577 (noting that determining whether a labor dispute constitutes impracticability often involves matters of federal and state labor laws).

8. 29 U.S.C. §§ 151-169 (2006).

9. This article does not address the related doctrine of frustration of purpose. This doctrine

concludes, however, that courts should not hesitate to scrutinize a party's alleged excuse for non-performance simply because federal labor law issues are involved.

I. THE CONTRACT DOCTRINE OF IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE

When two or more parties have entered into a contract, a party's non-performance of a contract duty when it is due is a breach,[10] and the injured party is provided with a right to damages.[11] Unlike a party's duty in tort to not act negligently, a party's liability under contract law is absolute or strict liability.[12] Thus, a party is liable for non-performance of a contract duty even if the party was not negligent.[13] In some situations, however, a party's duty to perform will never become due, and thus non-performance will not be considered a breach. An example is when the party's performance is rendered impossible or impracticable by an event occurring after the contract's formation.[14]

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could possibly be a defense to non-performance as a result of labor activity. For example, if a hotel and an organization entered into a contract for the hotel to host an event of the organization, and a union boycotted the hotel, the doctrine of frustration of purpose might excuse the organization's non-performance if a substantial number of expected guests for the event refused to attend.

10. RESTATEMENT (SECOND) OF CONTRACTS § 235(2).

11. *Id.* § 346(1).

12. *See id.* ch. 11, introductory note ("Contract liability is strict liability.").

13. *See id.* § 235 cmt. b ("When performance is due . . . anything short of full performance is a breach, even if the party who does not fully perform was not at fault . . . ."); *id.* ch. 11, introductory note ("It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he anticipated."); *see, e.g.*, Hawkins v. McGee, 146 A. 641 (N.H. 1929) (defendant doctor held liable for breach of a promise as to the result of an operation even though the doctor was not negligent).

14. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."). The doctrine of impossibility or impracticability of performance also applies to situations in which performance is impossible or impracticable at the time the contract is entered into. *See id.* § 266(1) ("Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary."). This article, however, will focus on so-called "supervening impracticability."

A. Impossibility at English Common Law

At early English common law, the circumstances under which a promisor's duty to perform would be excused because of unforeseen circumstances were few.[15] In general, a party was held to its contract obligations irrespective of any supervening event.[16] Although specific performance would often not be an option (for obvious reasons), the promisor would still be liable for damages.[17] If a party wanted to be excused from performing because of a supervening event, the party was expected to draft a contract provision providing for such an excuse.[18]

This "harsh traditional common law rule"[19] is exemplified by *Paradine v. Jane*,[20] decided by the Court of King's Bench in 1647.[21] In *Paradine*, a lessee was held obligated to pay promised rent to the lessor under a contract even though the lessee had been expelled from the land because of an invading force, and even though the lessee would presumably pay rent from the proceeds from working the land.[22] The court stated that

> when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies,

15. Equity courts, at least for a time, were apparently more likely to recognize unforeseen circumstances as an excuse for non-performance. *See* Wladis, *supra* note 2, at 1585-86 (noting that equity courts were more likely to recognize unforeseen circumstances as an excuse, at least until the early nineteenth century).

16. *See* Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 366 (Mass. 1974) ("[A] strict rule was originally followed denying any excuse for accident or 'inevitable necessity' . . . ." (quoting Adams v. Nichols, 36 Mass. (19 Pick.) 275, 276 (1837))); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 13.1, at 445 (6th ed. 2009) ("The harsh traditional common law rule was 'pacta sunt servanda;' promises must be kept though the heavens fall.").

17. PERILLO, *supra* note 16, § 13.1, at 445-46.

18. *Id.* at 446.

19. *Id.* at 445.

20. (1647) 82 Eng. Rep. 897 (K.B.); Aleyn 26.

21. *See* MURRAY, *supra* note 1, § 112, at 726 ("It is generally said that the early law of England, which was inclined to enforce a contract in accordance with its literal terms in all cases, took the uncompromising stand that neither impossibility, nor any change of circumstances, however extreme, would excuse performance of a promise. This view is set forth in the case of *Paradine v. Jane* . . . .").

22. *See Paradine*, 82 Eng. Rep. at 897-98; Aleyn at 26, 27.

yet he ought to repair it.[23]

Although some have construed *Paradine* as establishing a rule that performance is not excused even if performance becomes impossible, the case likely stood for the proposition that performance must be impossible, not merely onerous.[24] This is supported by the court's statement that the promisor is obligated to perform "if he may."[25] Also, the lessee's promised performance in *Paradine*—the payment of rent—was not impossible.[26] In fact, "[e]ven the defendant did not plead that it was impossible for him to pay, only that it was unreasonable to require him to pay when he had not received the use of the lands leased."[27] Additionally, the authorities cited in *Paradine* involved situations in which performance was "onerous," but not impossible.[28]

This reading of *Paradine* is further supported by the fact that English common law at the time had already recognized impossibility (as opposed to impracticability) as an excuse for non-performance in certain circumstances.[29] These circumstances included: (1) contracts for

23. *Id.*

24. *See* Wladis, *supra* note 2, at 1585 ("[O]n balance, it seems the *Paradine* court intended the contract portion of its rule to apply only if performance had not been made impossible.").

25. *See id.* at 1583 ("The court most likely meant that when a party creates a contractual duty in himself, he is bound to perform if performance is still possible—'*if he may*.'" (quoting *Paradine*, 82 Eng. Rep. at 898; Aleyn at 27)).

26. *See* MURRAY, *supra* note 1, § 112, at 726 n.1. As Dean Murray has observed, the lessee's performance in *Paradine*—the payment of rent—was in fact not rendered impossible or impracticable by the invading force. *See id.* ("It should be noted that the promisor's performance, i.e., paying the rent, was not made impossible at all by the supervening event."). *But see* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 531 (1975) ("The argument on the other side for contending that the payment of rent is impossible is that rent issues out of the land, and when the lessee is not in occupation he cannot collect the profits from which the rent must come . . . .").

27. Wladis, *supra* note 2, at 1584. Dean Murray believes the case is more appropriately classified as one in which the lessee was seeking to be excused from performing under what is now called the doctrine of "frustration of purpose." *See* MURRAY, *supra* note 1, § 112, at 726 n.1 ("If he were to be excused from performing, the only basis for such excuse would be frustration of purpose."); *see, e.g.*, Krell v. Henry, [1903] 2 K.B. 740 (A.C.) at 740-41, 754 (Eng.) (holding that the defendant was excused from paying a promised fee for the use of an apartment to watch a coronation procession when the procession was canceled after the parties entered into the contract). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate to the contrary.").

28. *See* Wladis, *supra* note 2, at 1583.

29. *See* MURRAY, *supra* note 1, § 112, at 726 ("Even the old English courts at the time of [*Paradine v. Jane*] recognized obvious exceptions to the rigid rule.").

personal services where the promisor died or was ill;[30] (2) contracts where performance was rendered unlawful by a supervening change in the law;[31] and (3) contracts where the existence of a thing necessary for performance is destroyed (e.g., promised goods) without the promisor's fault.[32]

A.W.B. Simpson has suggested that these exceptions were in fact but applications of a general theory that impossibility of performance (except when caused by the act of a stranger) was an excuse for non-performance.[33] Because initial impossibility (impossibility of performance at the time of contracting) rendered the contract void, "supervening *impossibility* [as opposed to performance simply being more onerous] as a defence follow[ed] *a fortiori*."[34] Others, however, have suggested that these were the only three situations in which performance would be excused, and the exceptions were probably limited to these three out of "an understandable fear to suggest any general principle of excusable nonperformance where these exceptions could be recognized as illustrations."[35] Williston stated, for example,

30. PERILLO, *supra* note 16, § 13.1, at 446; *see* MURRAY, *supra* note 1, § 112, at 726; *see also* E. ALLAN FARNSWORTH, CONTRACTS 620-21 (4th ed. 2004). This exception is traced to *Hyde v. Dean of Windsor*, (1597) 78 Eng. Rep. 798 (K.B.); Croke, Eliz. 552. *See* MURRAY, *supra* note 1, § 112, at 726 n.2.

31. PERILLO, *supra* note 16, § 13.1, at 446; *see* MURRAY, *supra* note 1, § 112, at 726; FARNSWORTH, *supra* note 30, at 620. This exception is traced to *Abbot of Westminster v. Clerke*, (1536) 73 Eng. Rep. 59 (K.B.); 1 Dyer 26b. *See* FARNSWORTH, *supra* note 30, at 620 & n.2; *see also* MURRAY, *supra* note 1, § 112, at 726 n.3.

32. FARNSWORTH, *supra* note 30, at 621; *see* MURRAY, *supra* note 1, § 112, at 726. This exception can be traced to Williams v. Lloyd, (1629) 82 Eng. Rep. 95 (K.B); W. Jones 179. *See* FARNSWORTH, *supra* note 30, at 621 & n.12; MURRAY, *supra* note 1, § 112, at 726 n.4. Williston apparently felt the decision in *Williams* was limited to live animals, and that it was not until *Taylor v. Caldwell*, discussed *infra* note 45, that this exception firmly took root. *See* 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1931, at 3281 (1924) ("So modern are the exceptions to the general principle, that it was not until after the middle of the nineteenth century that it was held that the destruction or non-existence of inanimate subject-matter to which a contract related would excuse a promisor from liability." (citations omitted)). In fact, "[t]here were at least two assumpsit cases holding that if performance became impossible by an act of God there was no excuse [and b]oth concerned carriers who lost cargo is tempests." Wladis, *supra* note 2, at 1585 n.53 (citing Taylor's Case, (1583) 74 Eng. Rep. 708 (K.B.); 4 Leon. 31); Thompson v. Miles, *summarized in* H. ROLLE, UN ABRIDGEMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY *Condition* § G, pl. 9, at 450 (1668)).

33. *See* SIMPSON, *supra* note 26, at 30.

34. *Id.* Professor Simpson acknowledges, however, that "[t]here is no direct authority [for this theory] except on the effect of the death of the covenantor, a clear case of act of God." *Id.* at 31. The rationale for considering void a promise to do something that, at the time the promise was made, was impossible was presumably that "it was thought to be absurd that the law should recognize an impossible promise." *Id.* at 525.

35. MURRAY, *supra* note 1, § 112, at 726. These three traditional exceptions are still recognized, and each has its own section in the Second Restatement. *See* RESTATEMENT (SECOND)

that "as to other cases of impossibility, it was thought enough to say that if the promisor wished to protect himself he might have done so by proper conditions or qualifications."[36] Professor John D. Wladis, however, has asserted that the law before *Paradine* was in "a state of flux," and thus no clear rules for the time period can be provided.[37]

Importantly, two types of cases would not excuse non-performance under early English common law. First, non-performance would not be excused if performance was simply rendered more onerous, as opposed to being rendered impossible.[38] For example, in the hypothetical provided in *Paradine*, a lessee who promises to repair a house is not excused from performing because it burns down from a lightning strike.[39] It might now be more onerous to repair the house, but it is not impossible. Second, Professor Simpson has concluded that even when performance was rendered impossible (as opposed to simply more onerous), if the impossibility was caused by the act of a stranger, the promisor's non-performance would not be excused.[40] Thus, in a case such as *Paradine*, non-performance would not be excused because performance (the payment of rent) was not impossible and also because the impossibility was caused by a stranger's act.[41]

But for whatever reason, during the first half of the nineteenth century, a "[s]trict interpretation of the *Paradine* principle" prevailed.[42] During this time, a series of cases adopted a rule that "the obligor is

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OF CONTRACTS § 262 (1981) (titled "Death or Incapacity of Person Necessary for Performance"); *id.* § 263 (titled "Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance"); *id.* § 264 (titled "Prevention by Governmental Regulation or Order"). But the Restatement Comment makes it clear that unlike the old English common-law rule, the modern doctrine of impracticability is not limited to these three circumstances. *See id.* § 261 cmt. a ("This Section states the general principle under which a party's duty may be so discharged. The following three sections deal with the three categories of cases where this general principle has traditionally been applied . . . [b]ut . . . this Section states a principle broadly applicable to all types of impracticability and it 'deliberately refrains from any effort at an exhaustive expression of contingencies.'" (quoting U.C.C. § 2-615 cmt.2 (2010))).

36. WILLISTON, *supra* note 32, § 1931, at 3280.

37. Wladis, *supra* note 2, at 1629-30.

38. SIMPSON, *supra* note 26, at 30. Professor Simpson asserts that this principle was established in *Paradine*. *See id.* at 33.

39. *See* Paradine v. Jane, (1647) 82 Eng. Rep. 897 (K.B.) 898; Aleyn 26, 27 ("And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.").

40. SIMPSON, *supra* note 26, at 30. Simpson discusses a 1455 case in which the defendant's failure to marry the plaintiff's daughter was not excused even though the daughter refused to marry him. *Id.* (citation omitted).

41. *See id.* at 532 ("For *Paradine v. Jane* is not dealing with an act of God at all, nor does it seek to impose liability for failure to do what is wholly impossible.").

42. Wladis, *supra* note 2, at 1588-89.

excused from performing only if the contract so provides, even if his performance becomes impossible."[43] Thus, a limited rule of impossibility as illustrated by *Paradine* in the mid-seventeenth century was made even more limited during the first half of the nineteenth century.

B. Modern Law of Impossibility or Impracticability of Performance

But then came the famous decision of the Court of King's Bench in 1863—*Taylor v. Caldwell*,[44] the case that is generally considered the first case in the modern era of the impossibility doctrine.[45] In *Taylor*, the parties entered into a contract under which the defendants promised to provide the plaintiffs with the use of the Surrey Gardens and Music Hall on four specified days for concerts and fêtes, and in exchange the plaintiffs promised to pay the defendants £100 for each day.[46] Before the first specified day, through no fault of either party, the Music Hall burned down,[47] and the plaintiffs sued the defendants for breach of contract.[48] The contract did not address such a contingency, and the court was required to decide whether the Music Hall's destruction excused the defendants' non-performance.[49] The court held that despite the general rule that even impossibility of performance was not an excuse (the strict version of *Paradine*),[50] when the parties must have assumed the continued existence of a specified thing as necessary to performance, it would be implied that the parties' duty to perform was conditional upon such continued existence.[51]

Building on the *Taylor* decision, by the beginning of the twentieth century, excuse was recognized (or again recognized, depending on one's view of the state of the law at the time of *Paradine*) in the following situations: "(1) Unavailability of a specific person or thing necessary for performance; (2) supervening domestic illegality or other governmental interference; (3) contractual excuse clause; (4) fault of a

43. *Id.* at 1592.

44. (1863) 122 Eng. Rep. 309 (K.B); 3 B. & S. 826.

45. PERILLO, *supra* note 16, § 13.1, at 446; *see also* MURRAY, *supra* note 1, § 112, at 727 ("The modern doctrine of impossibility of performance emerged from the case of *Taylor v. Caldwell* in 1863." (citation omitted)).

46. *Taylor*, 122 Eng. Rep. at 313; 3 B. & S. at 832.

47. *Id.* at 313; 3 B. & S. at 832.

48. *See id.*; 3 B. & S. at 833.

49. *Id.*; 3 B. & S. at 833.

50. *Id.*; 3 B. & S. at 833.

51. *Id.* at 315-16; 3 B. & S. at 839-40.

party; and (5) temporary delay likely to last for more than a reasonable time."[52]

More controversial, however, were situations in which performance was not rendered impossible by a supervening event, but rendered "impracticable" because such an event made performance more expensive or difficult than anticipated. As observed by Dean Murray,

> [f]rom its inception, the concept of impracticability was treated with extreme judicial caution and the modern judicial reaction clings to that view. To permit a promisor to be excused from performance because the cost of his performance has risen even to extreme levels appeared to threaten the fundamental concept of the social institution of contract.[53]

But it was believed there might be situations in which justice suggests that a supervening event was so unanticipated, and the resulting burden of performance on the promisor so extreme, that it cannot be said that the promisor assumed the risk of non-performance under the circumstances.[54]

The decision in *Taylor* might have already invited an expansion of the impossibility doctrine into the realm of the impracticable, if one considers rebuilding the Music Hall to have been possible. Williston, writing in 1920, stated that "[t]he fact that by supervening circumstances performance of a promise is made more difficult and expensive, or the counterperformance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor."[55] He then noted, however, that "where a very great increase in expense is caused by a circumstance not only unanticipated but inconsistent with facts which the parties obviously assumed as likely to continue, the basic reason for excusing the promisor from liability seems present."[56] And Williston was able to refer to cases in which non-performance had been excused when performance was not impossible, but only impracticable.[57]

In 1932, the Restatement (First) of Contracts included provisions regarding impossibility of performance.[58] The Restatement, as would be expected, provided that

52. Wladis, *supra* note 2, at 1608.
53. MURRAY, *supra* note 1, § 112, at 728.
54. *See id.*
55. WILLISTON, *supra* note 32, § 1963, at 3334 (citations omitted).
56. *Id.* § 1963, at 3336 (citations omitted).
57. *See id.* § 1963, at 3336-37 (citations omitted).
58. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 454-469 (1932).

> where, after the formation of a contract [1] facts that a promisor had no reason to anticipate, and [2] for the occurrence of which he is not contributing fault, [3] render performance of the promise impossible, the duty of the promisor is discharged, [4] unless a contrary intention has been manifested.[59]

But importantly, the First Restatement noted that "impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved,"[60] though it cautioned that "[m]ere unanticipated difficulty . . . not amounting to impracticability" is insufficient.[61] The First Restatement also made clear that non-performance would only be excused when it was "objectively" impossible, meaning that performance would be impracticable for anyone, as opposed to "subjectively" impossible, meaning that performance was only impossible for the promisor.[62]

The First Restatement included an illustration dealing specifically with impracticability and a labor dispute. The illustration provided as follows:

> A contracts with B to sell him on a specified day ten thousand yards of cloth of a specified kind manufactured in A's factory. B does not contract on the assumption that cloth previously manufactured cannot or will not be used to fulfil the contract. A, however, has not sufficient cloth of the kind on hand to enable him to fulfil the contract, and shortly after its formation a strike takes place in A's factory as part of an organized labor movement. The strike is due to conditions in other factories, and nothing that A can do will induce his employees to continue work. Conditions are also such that A cannot secure other employees qualified to complete the work. A's duty is not discharged.[63]

The American Law Institute did not explain, however, why the manufacturer's duty was not discharged because of the strike.[64] Particularly because the strike was not the manufacturer's fault and not one over which it had control, it would seem the manufacturer's duty would be discharged. It therefore must have been because the

59. *Id.* § 457.

60. *Id.* § 454.

61. *Id.* § 454 cmt. a; *see also id.* § 467 ("[F]acts existing when a bargain is made or occurring thereafter making performance of a promise more difficult or expensive than the parties anticipate, do not prevent a duty from arising or discharge a duty that has arisen.").

62. *Id.* § 455 cmt. a.

63. *Id.* § 461 illus. 7.

64. *See id.*

manufacturer had reason to anticipate the strike. For example, the Supreme Judicial Court of Massachusetts construed the illustration as standing for the proposition that "in general, labor disputes cannot be considered extraordinary in the course of modern commerce."[65] The failure to excuse the manufacturer's non-performance might also have been due to Williston, the First Restatement's reporter, being a "hard-liner" on the issue of impossibility and impracticability of performance.[66] But by 1938, even Williston conceded that the trend was toward strikes being recognized as an excuse for non-performance.[67]

Article 2 of the UCC also included a provision on impracticability.[68] Section 2-615 provides that unless the seller assumed a greater obligation,

> [d]elay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.[69]

The Official Comment notes that "[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance."[70] The Comment provides, however, that

> a severe shortage of raw materials or of supplies due to a contingency such as . . . unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.[71]

The question is, "[w]as the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance?"[72]

The Restatement (Second) of Contracts also included a provision

65. Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 368 (Mass. 1974).

66. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 64 (1981) (referring to Williston as one of the "hard-liners" on the issue of impossibility or impracticability of performance).

67. WILLISTON & THOMPSON, *supra* note 3, § 1951A, at 5464-68.

68. *See* U.C.C. § 2-615 (2010).

69. *Id.* § 2-615(a).

70. *Id.* § 2-615 cmt. 4.

71. *Id.*

72. Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 367 (Mass. 1974).

on impracticability.[73] Under section 261, a promisor's duty to perform is discharged if, after entering into the contract, "[1] performance is made impracticable [2] without his fault [3] by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made . . . [4] unless the language [of the contract] or the circumstances indicate the contrary."[74]

With respect to performance being impracticable, the Comment notes that "[p]erformance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved."[75] Similar to the UCC Comment, the Second Restatement Comment provides that "[a] severe shortage of raw materials or of supplies due to . . . unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section."[76] The Comment notes, however, that "[a] mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover."[77] The Comment further provides that "a party is expected to use reasonable efforts to surmount obstacles to performance . . . and a performance is impracticable only if it is so in spite of such efforts."[78] Also,

> if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinarily not discharged . . . . Instead, the rationale is that a party generally assumes the risk of his own inability to perform his duty. Even if a party contracts to render a performance that depends on some act by a third party, he is not ordinarily discharged because of a failure by that party because this is also a risk that is commonly understood to be on the obligor.[79]

With respect to "fault," the Comment states that "[a]s used here 'fault' may include not only 'willful' wrongs, but such other types of conduct as that amounting to breach of contract or to negligence."[80]

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73. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).
74. *Id.*
75. *Id.* cmt. d.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* cmt. e.
80. *Id.* cmt. d.

With respect to the "basic assumption" element, the Second Restatement's Introductory Note provides that "[d]etermining whether the non-occurrence of a particular event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence."[81] The Introductory Note provides that "[i]n making such determinations, a court will look at all circumstances, including the terms of the contract."[82] Factors include (1) whether the event was foreseeable; (2) "the relative bargaining positions of the parties"; (3) "the relative ease with which either party could have included a clause"; and (4) "the effectiveness of the market in spreading such risks as, for example, where the obligor is a middleman who has an opportunity to adjust his prices to cover them."[83] The Comment provides that "[i]n borderline cases this criterion is sufficiently flexible to take account of factors that bear on a just allocation of risk."[84]

With respect to whether the parties indicated an intention for the promisor's duty to not be discharged by the event, relevant circumstances include the promisor's "ability to have inserted a provision in the contract expressly shifting the risk of impracticability to the other party."[85] The Comment notes that "[t]his will depend on the extent to which the agreement was standardized . . . the degree to which the other party supplied the terms . . . and, in the case of a particular trade or other group, the frequency with which language so allocating the risk is used in that trade or group."[86]

The Second Restatement deleted the First Restatement's illustration 7, which failed to discharge a manufacturer's duty as a result of a strike by its employees.[87] The Reporter's Note provides that "[i]llustration 7 to former § 461, which dealt with the effect on a party's duties of a strike by his employees, is omitted, because the parties often provide for this eventuality and, where they do not, it is particularly difficult to suggest a proper result without a detailed statement of all the circumstances."[88]

81. *Id.* ch. 11, introductory note.
82. *Id.*
83. *Id.*
84. *Id.* § 261 cmt. b.
85. *Id.* cmt. c.
86. *Id.*
87. *See id.* § 261 reporter's note, cmt. d.
88. *Id.*

C. Procedural Issues

The defendant has the burden of proving the defense of impossibility or impracticability of performance.[89] Thus, the defendant has the burden of proving each element of the defense.[90] Also, "[t]he question is generally considered to be one of law rather than fact, for the court rather than the jury."[91]

D. Rationale for the Doctrine of Impossibility or Impracticability of Performance

Generally, three rationales are provided to explain the impracticability doctrine. First, some maintain that it is an implied-in-fact term.[92] Under this rationale, "[t]he contract is set aside . . . because the parties themselves implicitly stipulated such an outcome."[93] The Court of King's Bench took this approach in *Taylor v. Caldwell*.[94]

Second, some maintain that it is an implied-in-law term.[95] Implied-in-law terms are terms that are provided based on a value external to the contract, such as "community standards of fairness and policy."[96] The UCC and the Second Restatement, for example, reject the notion that the impracticability doctrine is based on an implied-in-fact term, and take the position that it is an implied-in-law term.[97] For example, the Second Restatement's Introductory Note states that such cases are considered ones in which there is a "'gap' in the contract."[98]

Scholars who believe that the law of impracticability is based on implied-in-law terms usually offer one of two bases for the terms: (1)

89. *See* Ocean Air Tradeways, Inc. v. Arkay Realty Corp., 480 F.2d 1112, 1117 (9th Cir. 1973); Oosten v. Hay Haulers Dairy Emps. & Helpers Union, 291 P.2d 17, 20 (Cal. 1955).

90. E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975).

91. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note.

92. STEPHEN A. SMITH, CONTRACT THEORY 297 (2004); *see also* RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note ("The rationale behind the doctrines of impracticability and frustration is sometimes said to be that there is an 'implied term' of the contract that such extraordinary circumstances will not occur.").

93. SMITH, *supra* note 92, at 297.

94. *See supra* Part I.B.

95. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note.

96. *See id.* § 204 (noting that when supplying an omitted term, "the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process").

97. *See id.* ch. 11, introductory note ("The rationale behind the doctrines of impracticability and frustration is sometimes said to be that there is an 'implied term' of the contract that such extraordinary circumstances will not occur. This Restatement rejects this analysis . . . .").

98. *See id.*

fairness; or (2) efficiency.[99] A scholar offering the "fairness" rationale "supposes that when courts set aside contracts [based on the impracticability doctrine] the reason is that the contract is unfair."[100] Specifically, "that it would be unfair to hold persons to contractual obligations that, through no fault of their own, are significantly more onerous than they had anticipated."[101] Williston, for example, felt the doctrine was based on "justice."[102] The Second Restatement also takes the position that the court must determine whether "justice" requires that the non-performance be excused.[103]

With respect to the "efficiency" rationale, Richard Posner and Andrew Rosenfield, in a famous article, asserted that in the absence of a contrary agreement, the promisor's duty to perform should be discharged when the promisee was "the superior risk bearer" with respect to the unanticipated event.[104] If the promisor was "the superior risk bearer," the promisor's non-performance should be a breach.[105] Posner and Rosenfield stated that

> [a] party can be a superior risk bearer for one of two reasons. First, he may be in a better position to prevent the risk from materializing. . . . Discharge would be inefficient in any case where the promisor could prevent the risk from materializing at a lower cost than the expected cost of the risky event.[106]

Second, one of the parties might be "the superior insurer."[107] A party is the superior risk insurer when it can better predict the probability of the loss occurring and the magnitude of the loss, and when it can better diversify away the risk.[108] This rationale is premised on the theory that one of contract law's purposes "is to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them."[109]

A third rationale for the impracticability doctrine is that the non-

99. *See* SMITH, *supra* note 92, at 283.
100. *See id.* at 287.
101. *Id.* at 288.
102. *See* WILLISTON & THOMPSON, *supra* note 3, § 1931, at 5410.
103. RESTATEMENT (SECOND) OF CONTRACTS § 272.
104. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90 (1977).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 91.
109. *Id.* at 88.

performing party did not agree to perform. As stated by one court,

> [i]t is implicit in the doctrine of impossibility . . . that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties. To require performance in that case would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract.[110]

As stated by Professor Charles Fried, "[w]here we really can be confident that neither party intended to cover this particular case, and where we can reach that conclusion without fearing a spreading disintegration of confidence in contractual obligations generally, no reason remains for enforcing this contract."[111]

II. LABOR ACTIVITY AND THE LAW

In the early nineteenth century, labor activity, at least when improper means were used, was sometimes prosecuted as a common-law criminal conspiracy.[112] Starting in 1842 with Chief Justice Shaw's decision in *Commonwealth v. Hunt*,[113] labor activity was generally no longer treated as a criminal conspiracy.[114] Instead, courts used their civil injunction powers to prohibit labor activity.[115] Labor activity was "treated as conspiracies which restrained trade and which inflicted irreparable damage upon the affected employer."[116]

In 1932, Congress passed the Norris-LaGuardia Act,[117] which prohibited federal courts from issuing injunctions in labor disputes. In 1935, Congress enacted the National Labor Relations Act.[118] The Act's purpose was to promote the recognition of unions by employers so as to

110. Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 367 (Mass. 1974).

111. FRIED, *supra* note 66, at 67.

112. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 2 (2d ed. 2004); Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 168 (1931); Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 827 (1926). *See generally* Commonwealth v. Pullis (Phila. Mayor's Ct. 1806), *reprinted in* 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al. eds., 1910).

113. 45 Mass. (4 Met.) 111 (1842).

114. STANLEY D. HENDERSON, LABOR LAW: CASES AND COMMENT 23 (2d ed. 2005).

115. GORMAN & FINKIN, *supra* note 112, at 2.

116. *Id.*

117. ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (2006)).

118. ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

reduce industrial strife that was burdening commerce, and to increase employee bargaining power and thereby increase employee wages, which in turn would increase employee purchasing power and avoid recurrent business depressions.[119] The Supreme Court has noted that "a primary purpose of the [NLRA] was to redress the perceived imbalance of economic power between labor and management."[120] Congress "sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers."[121] For example, under section 7 of the Act, employees were given the right to form and join unions and to engage in other concerted activity for the purposes of improving terms and conditions of employment.[122] Under section 8(a)(1), it was made an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" an employee in the exercise of his or her section 7 rights.[123] Congress also made it an unfair labor practice for employers to discriminate against employees for seeking to form or join a labor union.[124]

An administrative agency—the NLRB—was established to oversee elections to determine whether the employees desired to have a union as their exclusive representative for purposes of bargaining with their employer over terms and conditions of employment.[125] Importantly, Congress intended the NLRB to make labor relations policy.[126]

The Act also made it an unfair labor practice for either the union or the employer to refuse to collectively bargain.[127] To bargain collectively was defined, under the Taft-Hartley Act of 1947 (which amended the NLRA), as "the mutual obligation of the employer [and the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[128] It has been stated that

119. *See* 29 U.S.C. § 151 (2006).

120. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

121. *Id.*

122. *See* 29 U.S.C. § 157.

123. *Id.* § 158(a)(1).

124. *Id.* § 158(a)(3).

125. *Id.* § 159.

126. *See generally* Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 184-86 (2008) (discussing the NLRB's policymaking function).

127. 29 U.S.C. § 158(a)(5), (b)(3).

128. *Id.* § 158(d).

> [t]he purpose of the Act is to bring to the bargaining table parties willing to present their proposals and articulate supporting reasons, to listen to and weigh the proposals and reasons of the other party, and to search for some common ground which can serve as the basis for a written bilateral agreement.[129]

Importantly, though, the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."[130] Thus, whether there has been a violation is generally based on a review of "all of the circumstances."[131] The issue is whether the party is "seeking to frustrate agreement, or to disrupt negotiations, or to oust the other party of 'partnership' in determining wages and working conditions."[132]

But importantly, the Act "contemplated resort to economic weapons should more peaceful measures not avail."[133] Thus, the Court has held that an employer does not violate the Act by locking out employees solely as a bargaining tactic.[134] Similarly, the Court has held that section 7 protects an employee's right to strike.[135]

Although the Supreme Court has stated that "the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management,"[136] the Court has interpreted sections 7 and 8(a)(1) to ensure that neither unions nor employers have too great an advantage during a strike through the use of various strike weapons.[137] For example, although an employer violates section 8(a)(1) and (a)(3) if it terminates a striking employee who has not secured alternative employment,[138] an employer does not violate section 8(a)(1) and (a)(3) if it refuses to reinstate a striking employee (in an economic strike) due to a legitimate and substantial business reason.[139] The most important legitimate and substantial business reason justifying not reinstating a striking employee is when the employer permanently replaces the

129. GORMAN & FINKIN, *supra* note 112, at 532.
130. 29 U.S.C. § 158(d).
131. GORMAN & FINKIN, *supra* note 112, at 532.
132. *Id.*
133. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965).
134. *Id.* at 318.
135. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 15-17 (1962).
136. *Am. Ship Bldg. Co.*, 380 U.S. at 316.
137. *See, e.g., id.* at 318 (discussing the employer's power to lock out employees); *Wash. Aluminum Co.*, 370 U.S. at 15-18 (discussing the employee's right to strike).
138. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).
139. *See id.* at 378.

employee during an economic strike.[140] In such a situation, the striking employee is replaced, but remains an employee entitled to reinstatement when the position becomes available, as long as the employee has not secured regular and substantially equivalent employment.[141]

The Court has also held that an employer cannot offer significant inducements to striking employees and strike replacement workers to abandon the strike and come to work. For example, in *NLRB v. Erie Resistor Corp.*,[142] the Court held that an employer violated the Act when it offered striking employees and strike replacement workers twenty-year seniority credit, when seniority dictated who would be laid off in the event of a reduction in force.[143]

The NLRB has also held that an employee engages in section 7 protected activity when he or she refuses to cross a picket line at another company's premises (so-called "sympathy strikers").[144] Accordingly, the Board (with the approval of a majority of the courts of appeals) has held that an employer violates section 8(a)(1) for terminating or disciplining such an employee in the absence of a sufficient business justification.[145] Some courts of appeals, however, have been critical of the Board's approach, which rarely finds a sufficient business justification.[146]

The NLRA does not include an explicit preemption provision, and thus the task of determining its preemptive scope has been left to the federal courts.[147] The Supreme Court has held that the NLRA preempts federal court and state regulation when the activity being regulated is either protected or prohibited by the NLRA, or is arguably protected or prohibited by the NLRA (so-called "*Garmon* preemption").[148] The

140. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (dicta). For a useful discussion of *Mackay*, see Julius G. Getman & Thomas C. Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.: *The High Cost of Solidarity*, *in* LABOR LAW STORIES 13 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

141. Laidlaw Corp., 171 N.L.R.B. 1366, 1369-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

142. 373 U.S. 221 (1963).

143. *See id.* at 222-23, 236.

144. Torrington Constr. Co., 235 N.L.R.B. 1540, 1541 (1978), *overruled on other grounds by* Butterworth-Manning-Ashmore Mortuary, 270 N.L.R.B. 1014, 1015 (1984); *see also* GORMAN & FINKIN, *supra* note 112, at 435 (referring to such employees as "sympathy strikers").

145. *Torrington*, 235 N.L.R.B. at 1541; *see also* GORMAN & FINKIN, *supra* note 112, at 480 ("The Labor Board and the courts of appeals are now in substantial agreement that an employee's refusal to cross a picket line during the course of his or her work is statutorily protected.").

146. *See, e.g.*, Bus. Servs. by Manpower, Inc. v. NLRB, 784 F.2d 442, 454 (2d Cir. 1986).

147. *See* Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408, 2412 (2008) (noting that the NLRA "contains no express pre-emption provision").

148. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-46 (1959); *see also*

primary purpose of this preemption rule is to protect the primary jurisdiction of the NLRB over unfair labor practice issues.[149] Also, preemption exists when a federal court or a state regulates conduct that Congress intended to be unregulated and left to the "'free play of economic forces'" (so-called "*Machinists* preemption").[150] But preemption would not occur where the regulated activity (1) is "a merely peripheral concern of the Labor Management Relations Act"[151] or (2) "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act."[152] In such cases, courts assume that Congress did not intend the NLRA to preempt state law.[153] The Court has also held that although a state law of general applicability (as opposed to one specifically targeted at labor activity) can be preempted, "a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity."[154]

III. CASES INVOLVING LABOR ACTIVITY AND THE DOCTRINE OF IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE

Cases involving labor activity and the defense of impossibility or impracticability of performance can be placed in four broad categories: (1) cases in which the seller of goods or services fails to perform because of a strike by its employees; (2) cases in which the seller of goods or services fails to perform because of a strike at a third-party supplier, which made it difficult for the seller to obtain the materials or means to perform; (3) cases in which the seller of goods or services fails to perform because of a picket line at the place of delivery, which is honored by the seller or its employees; and (4) cases in which the buyer frustrates the seller's ability to perform by refusing to cooperate with the seller's performance because a union has threatened to go on strike against the buyer. Representative case law involving each of these

Brown, 128 S. Ct. at 2412 (referring to this type of preemption as "*Garmon* pre-emption").

149. *See* Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 138-39 (1976) (citations omitted).

150. *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); *see also Brown*, 128 S. Ct. at 2412 (referring to this type of preemption as "*Machinists* pre-emption").

151. *Garmon*, 359 U.S. at 243.

152. *Id.* at 244.

153. *See, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491, 509 (1983).

154. N.Y. Tel. Co. v. N.Y. Dep't of Labor, 440 U.S. 519, 533 (1979) (plurality opinion).

categories is discussed below.[155]

A. Non-Performance Owing to Strike by Seller's Employees

A common scenario is one in which a seller of goods or services alleges that its non-performance was due to a strike by its employees.[156] Not surprisingly, consistent with a strict view of the impossibility doctrine, early cases often rejected a strike at the promisor's plant as a defense to failure to perform. Thus, in the 1903 decision in *Puget Sound Iron & Steel Works v. Clemmons*,[157] the court rejected, with little discussion, the defendant's argument that its failure to perform was due to a "strike at its works."[158] The court, in response to the argument, simply stated that "[t]his was certainly a breach of the agreement."[159]

Even for those courts that were inclined to address the issue at greater length, a seller's argument that performance was simply more difficult was predictably met with failure. For example, in the 1918 decision in *Rudolph Saenger Co. v. Giant Silk Mfrs., Inc.*,[160] the defendant argued that its failure to deliver promised goods was excused under a contract provision stating that "seller shall not be held liable because of late or non delivery due to strikes."[161] The court rejected this argument because the defendant's plant remained in constant operation except for a ten-day period as a result of a strike, and the other unspecified labor activity merely reduced production to a below normal level.[162] The court held that "[t]his situation did not justify an absolute refusal to deliver at any time."[163] The court also believed that it was "significant that the market price for the goods had risen."[164]

Interestingly, courts during this period were more lenient when the seller was only required to perform within a reasonable amount of time, as opposed to a specified date. For example, in the 1906 decision of *Barnum v. Williams*,[165] the plaintiff and the defendant entered into a

155. For a list of additional cases, see WILLISTON & LORD, *supra* note 3, § 77:92.

156. *See The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV 836, 890 (1957) ("One of the most recurrent hazards interrupting a seller's ability to perform his contractual obligations are strikes by his own employees . . . .").

157. 72 P. 465 (Wash. 1903).

158. *Id.* at 467.

159. *Id.*

160. 172 N.Y.S. 667 (App. Term 1918).

161. *Id.* at 668.

162. *Id.*

163. *Id.*

164. *Id.*

165. 102 N.Y.S. 874 (App. Div. 1906), *aff'd*, 83 N.E. 1122 (N.Y. 1907).

contract under which the plaintiff promised to perform work on the defendant's construction project by a specified date.[166] The plaintiff failed to complete the work by the specified date due to the defendant's fault.[167] Thereafter, the parties continued with the contract, but the plaintiff was further delayed when its employees went on strike.[168] The court held that the plaintiff's failure to complete the work by the promised date was excused because it was caused by the defendant's conduct.[169] At that point, the plaintiff, if the parties chose to continue with the contract, was required to complete the work within a reasonable amount of time.[170] The court then held that when a party is required to perform within a reasonable amount of time, such additional time "does not include any period, long or short, during which he is unable to proceed by reason of a strike."[171] The court acknowledged that the result would be different if the promisor were obligated to complete performance within a specified amount of time.[172] The Second Circuit followed the approach of the *Barnum* court in *The Richland Queen*,[173] in which the court affirmed a trial court finding that a dock company's delay in repairing a ship was reasonable because its employees went on strike.[174]

More recently, and after the NLRA's enactment, a supplier's argument that a strike by its employees rendered performance impossible or impracticable met with greater success. In the 1995 decision in *Bristol Township School District v. Ryder Transportation Services*,[175] the defendant transportation company entered into a contract with the plaintiff school district, under which the transportation company promised to provide school bus services to the school district for five years.[176] The contract included a force majeure clause that provided that the transportation company "will incur no liability [to the school district for the] failure to perform any obligation under this Agreement if prevented by . . . labor disputes . . . or any other cause beyond

166. *Id.* at 874-75.
167. *Id.* at 875.
168. *Id.* at 876.
169. *See id.* at 875-76.
170. *See id.* at 877 (citation omitted).
171. *Id.*
172. *Id.*
173. Richland S.S. Co. v. Buffalo Dry Dock Co., 254 F. 668, 670 (2d Cir. 1918).
174. *See id.* at 668-70.
175. No. Civ. A. 93-5983, 1995 WL 116673 (E.D. Pa. Mar. 20, 1995).
176. *Id.* at *1.

[defendant's] control, whether existing or hereafter."[177] Three months after starting performance, the transportation company's drivers unionized.[178] About three months later, after the transportation company and the union could not agree on the terms of a collective bargaining agreement, the union directed the drivers to strike.[179] The transportation company allegedly offered drivers a two hundred dollar bonus if they returned to work, but the union declined the offer and the strike continued.[180] Certain school district employees allegedly directed the transportation company to not use replacement workers, and the transportation company failed to provide the promised school bus services.[181] The school district then sued the transportation company for breach of contract based on the company's failure to provide the bus service.[182]

The transportation company moved for summary judgment, arguing that its non-performance was excused under the contract's force majeure clause, asserting that the strike was a "labor dispute" that "prevented" it from performing its contract duties.[183] In response, the school district argued that the strike was not a labor dispute, maintaining that the term was intended to refer only to a labor dispute involving a "third party" and not a labor dispute between the school district and the transportation company.[184] The court rejected this argument, however, concluding that the term "labor dispute" was unambiguous, and its clear meaning included any labor dispute, not just a labor dispute involving a third party.[185]

The school district also argued that it was a disputed issue of fact whether the transportation company's performance was "prevented" by the strike.[186] The court noted that as a result of the strike, there were only two ways the transportation company could have performed its contract duties: (1) settle the strike by conceding to the union's salary demands; or (2) hire replacement drivers.[187]

177. *Id.*
178. *See id.*
179. *See id.*
180. Bristol Twp. Sch. Dist. v. Ryder Student Transp. Servs., Inc., No. Civ. A. 93-5983, 1994 WL 440236, at *2 (E.D. Pa. Aug. 12, 1994).
181. *See id.* at *4.
182. *Id.*
183. *See id.*
184. *See id.* at *3.
185. *See id.*
186. *Id.* at *2.
187. *Id.* at *3.

With respect to whether the transportation company could have settled the strike by conceding to the union's salary demands, the court held that because the company was free under the NLRA to take any position it wished during negotiations with the union, as long as it acted in good faith, the court would not permit "a jury to speculate about what salary decisions [the defendant] should have made in its good faith negotiations with the [union]."[188]

With respect to hiring replacement workers, the transportation company introduced evidence that the school district had directed it not to hire replacement workers because of fear that striking employees would "direct violence toward busses driven by replacements, thus endangering the transported students," and because it was concerned that the largely pro-union community would be angered by the use of replacements.[189] The court noted that if this evidence had been undisputed, summary judgment in the transportation company's favor would have been warranted.[190] But the school district introduced affidavits denying the allegations, and thus a genuine issue of material fact was created.[191]

Thereafter, the school district moved for summary judgment, arguing that the undisputed facts demonstrated that the transportation company's non-performance was not excused under the contract's force majeure clause.[192] In support of its motion, the school district argued that the transportation company could have settled the strike by agreeing to the union's salary demands.[193] In particular, the school district argued that if the transportation company had given in to the union's salary demands, its cost of performing the contract would have increased by only eighteen percent.[194]

The district court first held that the force majeure clause's use of the word "prevented" indicated the parties did not intend to adopt economic impracticability as the standard for excusing non-performance, but instead intended a broader standard.[195] The court then stated that the decisions in *Badhwar v. Colorado Fuel & Iron Corp.*[196] and *Mishara*

188. *Id.* at *4.
189. *Id.*
190. *Id.* at *5.
191. *Id.*
192. Bristol Twp. Sch. Dist. v. Ryder Transp. Servs., No. Civ. A. 93-5983, 1995 WL 116673, at *1 (E.D. Pa. Mar. 20, 1995).
193. *See id.* at *2.
194. *Id.*
195. *See id.* at *3.
196. 138 F. Supp. 595 (S.D.N.Y. 1955), *aff'd*, 245 F.2d 903 (2d Cir. 1957).

Construction Co. v. Transit-Mixed Concrete Corp.[197] showed that "[c]ourts have resisted a rigid application of the impracticability doctrine to strike situations."[198] The court also noted that the American Law Institute, when drafting the Second Restatement, had deliberately omitted illustration 7 of the First Restatement, which provided that a strike excused a party's non-performance.[199] The court noted that "[t]he drafters [of the Second Restatement] opined that the parties often provided for this eventuality and, where they did not, it was particularly difficult to suggest a proper result without a detailed statement of all the circumstances."[200] The court then cryptically concluded that "*Mishara* and *Badhwar* suggest that the court should enforce the contract's terms by examining the circumstances presented by the strike, rather than by resorting to traditional impracticability analysis."[201]

The court also referenced its prior holding that the NLRA prohibited the court from inquiring into the substance of the collective bargaining negotiations "absent a showing that either party had been found to have engaged in bad faith negotiations," and there was no such showing here.[202] The court then held that "[r]eading the *force majeure* standard together with the limitations imposed by the NLRA, [the transportation company] need only show that it made reasonable attempts to negotiate with the [union] to effectuate the clause. Whether [the transportation company] could, in fact, have met the [union's] demand is immaterial to that determination."[203] The court thus held that "an economic hardship analysis is inapplicable to [the transportation company's] assertion of the impracticability defense."[204]

With respect to the issue of hiring replacement workers, the court rejected the school district's argument that the district employees who allegedly told the transportation company to not hire replacement workers could not bind the district.[205] Also, there was an issue of fact as to whether the transportation company could have safely continued to provide bus services during the strike.[206] The court then held that although "[b]y law, [the transportation company] was required to take

197. 310 N.E.2d 363 (Mass. 1974).
198. *Bristol*, 1995 WL 116673, at *3.
199. *Id.*
200. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 261 reporter's note, cmt. d (1981)).
201. *Id.* at *4.
202. *Id.* at *2.
203. *Id.* at *4.
204. *Id.*
205. *Id.* at *5.
206. *Id.* at *6 n.10.

reasonable steps to perform despite the strike," and although the transportation company was legally entitled to hire replacement workers, "[t]he practicability of hiring replacement drivers under the circumstances is a fact issue for adjudication."[207] Accordingly, the court denied the school district's motion for summary judgment.[208]

B. Seller's Non-performance Owing to Third-Party Strike

A second common scenario is when a seller who fails to perform alleges that its non-performance was caused by a third-party strike that rendered necessary goods or material unavailable. In general, courts have not been receptive to such arguments.

In the 1906 decision of *Samuel H. Cottrell & Son v. Smokeless Fuel Co.*,[209] the buyer and seller entered into a contract under which the seller promised to deliver coal from a particular supplier at a specified price.[210] The contract included a provision that stated "[d]eliveries of coal under this contract are subject to strikes . . . beyond the control of the [seller] which may delay or prevent shipment."[211] After the seller started performing, a strike occurred at the supplier's coal mine.[212] The supplier continued to supply coal to the seller, but at a higher price because of added supplier costs due to having to employ guards and take other measures during the strike.[213] As a result, the seller refused to deliver coal to the buyer at the contract price, and the buyer brought suit for breach of contract.[214]

The trial court directed a verdict for the seller based on the view that the strike authorized the seller to annul the contract,[215] and the buyer appealed.[216] The court of appeals reversed, holding that the doctrine of impracticability only applies to "the act of God, the law, or the conduct of the plaintiff."[217] In this respect, the court's decision was consistent with a strict approach to impossibility that did not apply when the impossibility was caused by a third party. With respect to the contract

207. *Id.* at *6.
208. *Id.*
209. 148 F. 594 (4th Cir. 1906).
210. *Id.* at 595.
211. *Id.*
212. *Id.* at 596.
213. *Id.*
214. *See id.* at 595-96.
215. *Id.* at 596.
216. *Id.*
217. *Id.* at 598.

provision providing for an excuse, the court stated that it did not apply because the shipment of coal was not prevented or delayed by the strike.[218]

In the 1919 decision of *De Grasse Paper Co. v. Northern New York Coal Co.*,[219] the plaintiff paper manufacturer and the defendant jobber entered into a contract under which the jobber promised to deliver coal from a particular mine to the manufacturer.[220] The jobber did not have any interest in the mine and did not control its output.[221] The contract included a provision stating that

> [t]his contract is made subject to strikes . . . or other causes beyond the control of either party. The buyer and seller recognizing the uncertainty of absolute deliveries, it is hereby mutually acknowledged that the intent of this agreement is not to hold either party for damages accruing through failure to carry out the contract when such failure is due to reasons beyond the control of the party in default, but that the material shall be shipped by the seller and accepted by the buyer as per deliveries specified, so far as the labor, the physical conditions existing at the plants of the buyer and seller respectively, and the ability of the transportation companies will permit.[222]

For four months, there were labor troubles at the mine as well as a shortage of cars, which reduced the amount of the mine's output.[223] Although the mine produced more than sufficient coal for the jobber to comply with its contract with the paper manufacturer, the mine's selling agents sold all of the coal to other parties.[224] The jobber therefore failed to deliver a large portion of the coal.[225] When the paper manufacturer brought suit for breach of contract, the jobber asserted it was not liable because of the contract's "strike clause."[226]

The court rejected this argument, however, finding that labor troubles at the mine were a remote cause, and not the proximate cause, of the jobber's breach.[227] The court held that the jobber's failure to secure a contract with the mine's selling agents for the coal needed by

218. *Id.*
219. 179 N.Y.S. 788 (App. Div. 1919).
220. *Id.* at 788.
221. *Id.* at 788-89.
222. *Id.* at 789.
223. *Id.* at 790.
224. *Id.*
225. *Id.* at 788.
226. *Id.* at 788-89.
227. *Id.* at 790-91.

the jobber to comply with its contract with the paper manufacturer was the breach's proximate cause.[228] Accordingly, "[s]ince the strikes and car shortage were not the proximate cause of the breach, they were of no avail to the [jobber], and it was not excused under the evidence by reason of the strike clause."[229]

In the 1953 decision of *S.A. Ghuneim & Co. v. Southwestern Shipping Corp.*,[230] the plaintiff and the defendant entered into a contract under which the defendant promised to sell and deliver to the plaintiff ten Ford trucks.[231] The contract was not for Ford trucks from any specific dealer.[232] When the defendant only delivered four trucks, the plaintiff sued for breach of contract.[233] The defendant argued that the 1952 steel strike, which made steel scarce, and the National Production Authority's regulations requiring steel producers and distributors to fill orders considered essential to national defense, made it impossible for it to deliver the other six trucks.[234]

The court rejected the argument, finding that

> neither the strike nor the regulations made the manufacture or sale of Ford trucks illegal, and they did not cause to pass out of existence the Ford trucks which . . . were on hand in Ford plants and in the sales rooms of the thousands of Ford dealers throughout the country in numbers far in excess of the 6 which defendant promised to and then failed to deliver.[233]

Although the defendant apparently thought it would be able to obtain the trucks from the particular dealer with whom it normally dealt, the contract did not require trucks from any particular dealer, and thus this was not a case involving the failure of a required article to continue to exist.[235] The court stated that

> [t]he law undoubtedly has come a long way from Paradine v. Jane, but I think it has not reached and should not be permitted to reach the point where performance of an unqualified and unconditional promise to deliver an insignificantly small number of an article ordinarily manufactured and sold over the whole country by tens of thousands is

228. *Id.* at 790-91.
229. *Id.* at 791.
230. 124 N.Y.S.2d 303 (Sup. Ct. 1953).
231. *Id.* at 305.
232. *See id.* at 306-07.
233. *Id.* at 305-06.
234. *Id.* at 306.
235. *Id.* at 306-07.

> excused by a strike of the workmen engaged in the production of a product which is but a part, even though an essential part, of the manufacture of such article.[236]

The court also believed that because the practice of including clauses in contracts excusing non-performance as a result of labor activities or inability to obtain raw materials was so common, to excuse non-performance in the absence of such a provision "would defeat the fair and just expectations of the promisee."[237]

In the 1955 decision in *Badhwar v. Colorado Fuel & Iron Corp.*, a seller and a buyer entered into a contract in August 1948, under which the seller promised to deliver to the buyer (located in India) a specified quantity of caustic soda, to be delivered in two parts.[238] The seller promised that the first part would be shipped no later than September 22, 1948, and the second part no later than October 10, 1948.[239] During this time there was a threatened maritime strike.[240] On June 14, 1948, federal courts enjoined any strike for an eighty-day period to expire on September 2, 1948.[241] During this time, negotiations between the unions and the maritime industry were taking place, and the maritime industry was optimistic that their differences with the unions could be resolved prior to September 2, 1948.[242] Freight forwarders apparently shared this optimism, and continued to do business as usual, and booked freight for July, August, and September departures.[243] The seller delivered the goods to a third party who had promised to ship the goods to the buyer, and the goods were loaded onto the ship from August 31, 1948 to September 2, 1948.[244] On September 3, 1948, the crew went on strike.[245] The strike rendered it impossible to either sail the boat or remove the goods.[246]

The court held that the seller was not liable for the late delivery caused by the strike because, as construed by the court, the ownership of the goods (and thus any risk of late delivery) passed to the buyer upon

236. *Id.* at 307 (citation omitted).
237. *Id.*
238. 138 F. Supp. 595, 599-600 (S.D.N.Y. 1955), *aff'd*, 245 F.2d 903 (2d Cir. 1957).
239. *Id.* at 600.
240. *Id.*
241. *Id.*
242. *Id.* at 600-01.
243. *Id.* at 601.
244. *Id.* at 602.
245. *Id.* at 603.
246. *Id.* at 605.

loading the goods on the third-party's ship.[247] Accordingly, the seller had fully performed its contract duties.

But, more importantly for present purposes, the court held that even if the seller's promise had been to deliver the goods to their ultimate destination by a particular time, the seller should be relieved of any liability for loss occurring as a result of the strike.[248] The court felt that whether a strike will occur, and how long it would last, are too uncertain, and "[i]n the face of the many contingencies to hamstring sellers and shippers from proceeding to load and dispatch because of local and national waterfront and shipping labor disturbances would virtually stymie foreign commerce."[249]

The court recognized that some contended that it is better to have the seller bear the risk of loss as "one of the risks incident to his business," but the court believed that "[s]uch reasoning is more applicable to strikes affecting the seller's plant or place of business which might be avoided by his own act, i.e., acquiescing in the employees' demands."[250] But here, the seller had no control over the striking employees.[251] And although "[a]t times it can be said that the parties to a contract can allocate the risk of strike as between themselves by making provision therefor in their contract," contracts are often made in haste, as was the contract at issue.[252]

The court stated that "[r]ather than mechanically apply any fixed rule of law, where the parties themselves have not allocated responsibility, justice is better served by appraising all of the circumstances, the part the various parties played, and thereon determining liability."[253] The court concluded that the seller "acted in good faith and under the circumstances exercised reasonable business prudence."[254] The court also noted that the seller was faced with a dilemma.[255] If the seller had decided not to load the goods because of the fear of a strike, it could face liability for delay if a strike did not occur or occurred but was resolved quickly.[256] The court concluded:

247. *See id.* at 605-07.
248. *Id.* at 607.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 608.
255. *Id.*
256. *Id.*

> For us to require sellers to know with foresight how long a strike will last and to stop their commercial operations until the shipping picture is completely clear is just too much tightrope walking to require of any one. Where there is a strike, delay caused thereby, and loss caused by the delay, the loss suffered by a party to a commercial contract is better borne by him upon whom it falls, absent, of course, malfeasance by any of the interested parties.[257]

In the 1959 decision of *Oliver-Electrical Manufacturing Co. v. I.O. Teigen Construction Co.*,[258] the defendant had a contract with a power company to construct a transmission line.[259] The defendant and the plaintiff entered into a contract under which the plaintiff promised to manufacture certain hardware for use by the defendant on its project with the power company.[260] One of the pieces of hardware was an item made of steel.[261] When the plaintiff brought suit to recover an unpaid balance under the contract for goods sold and delivered, the defendant counterclaimed for a delay in the promised goods being delivered.[262] In response to the defendant's counterclaim, the plaintiff argued that its failure to comply with the promised delivery dates was excused under the doctrine of impossibility because of a steel strike that delayed the plaintiff's purchase of steel needed for the hardware.[263] The court rejected the defense, however, stating that "the impossibility must arise from facts which the promisor has no reason to anticipate," and "[t]he evidence clearly shows [the plaintiff] realized the contingency of a steel strike at the time of entering into the contract."[264]

In the 1960 decision of *Butler v. Nepple*,[265] the plaintiff, a lessee of certain property, assigned his rights to the defendant in exchange for a sum of money.[266] The assignment provided that if the defendants had not begun drilling for oil and gas on the property by a certain date, the defendant would pay the plaintiff a specified sum of money each month as rent until drilling began or until the defendant reassigned its rights to the plaintiff.[267] The contract that was assigned included a force majeure

257. *Id.*
258. 177 F. Supp. 572 (D. Minn. 1959).
259. *Id.* at 574.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 576.
264. *Id.*
265. 354 P.2d 239 (Cal. 1960).
266. *Id.* at 240.
267. *Id.* at 240-41.

clause providing that the "obligations of the Lessee . . . shall be suspended while the Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, actions of the elements . . . or other matters or conditions beyond the control of the Lessee, whether similar to the matters or conditions herein specifically enumerated or not."[268] The defendant never drilled on the property, and did not reassign the lease until more than eleven months later.[269] The plaintiff then sued the defendant for the delay rentals allegedly due under the contract.[270] The defendant argued that its non-performance was excused under the contract's force majeure clause because it was unable to obtain the required equipment for drilling due to a steel strike.[271] The trial court concluded that the steel strike did not excuse the defendant's non-performance.[272]

On appeal, the California Supreme Court affirmed the trial court, concluding that there was sufficient evidence for the trial court to find that the defendant had not carried its burden of demonstrating that the force majeure clause excused its non-performance.[273] The court relied on the defendant's testimony that the necessary equipment was available, it was simply well over the usual price, though the defendant did not testify by how much.[274] Because the defendant had not introduced any evidence of the price for steel at the time, the trial court was justified in finding that the defendant had failed to carry its burden of proving that there existed "extreme and unreasonable difficulty, expense, injury or loss involved."[275]

In the 1977 decision of *Heat Exchangers, Inc. v. Map Construction Corp.*,[276] the seller alleged that its non-delivery of promised goods was due to "strikes."[277] But the only testimony in support of the defense was the following from the seller's marketing and sales agent as follows: "[t]here has been some testimony having to do with strikes of various factories. In my estimation the strikes caused a very small portion of the

268. *Id.* at 244.
269. *Id.* at 241.
270. *Id.* at 240.
271. *Id.* at 241.
272. *Id.*
273. *Id.* at 245.
274. *Id.* at 244-45.
275. *Id.* at 245 (quoting Oosten v. Hay Haulers Dairy Emps. & Helpers Union, 291 P.2d 17, 20 (Cal. 1955)).
276. 368 A.2d 1088 (Md. Ct. Spec. App. 1977).
277. *Id.* at 1091.

problems that we encountered at that time."[278] Not surprisingly, the court concluded that there was "nothing in the record showing or tending to show that strikes in any way provided an excuse for non-delivery."[279]

But when the contract includes a force majeure clause excusing non-performance as a result of a strike, and the parties agree that performance was rendered impossible by a third-party strike, non-performance will be excused.[280] Thus, in *Dant & Russell v. Grays Harbor Exportation Co.*,[281] the court held that a seller's non-performance was excused when the contract's force majeure clause referred to strikes, and the parties agreed that a longshoremen strike made delivery of the goods impossible.[282] Also, in some cases it will be a disputed issue of fact as to whether a strike by employees of the manufacturer will excuse performance by the seller.[283]

C. Non-Performance Owing to Picket Line at Place of Delivery

A third common scenario is where a seller of goods or services fails to perform because either it or its employees refuse to cross a picket line at the place of delivery. In *Consolidated Freight Lines, Inc. v. Department of Public Service*,[284] the Washington Department of Public Service suspended the permits under which some trucking companies operated, after the trucking companies refused to provide services to a hotel at which a picket line was established.[285] The union representing the drivers of the trucking companies told the companies that if they permitted trucks to cross the picket line, or terminated any drivers for refusing to do so, the union would call a strike of all the trucking companies' employees represented by the union.[286] The trucking companies therefore refused to send any trucks through the picket line,

278. *Id.* at 1091-92.

279. *Id.* at 1092.

280. *See* Dant & Russell, Inc. v. Grays Harbor Exp. Co., 106 F.2d 911, 912 (9th Cir. 1939) (holding that the force majeure clause including a provision on strikes, lockouts, or labor disputes exempted the seller from liability for non-delivery of materials caused by a longshoremen strike throughout Pacific coast ports).

281. 106 F.2d 911 (9th Cir. 1939).

282. *See id.* at 912.

283. *See* Glassner v. Nw. Lustre Craft Co., 591 P.2d 419, 421 (Or. Ct. App. 1979) (holding that summary judgment was improper because it was a disputed issue of material fact as to whether the defense of impracticability was established by the seller when there was a strike by the manufacturer's employees).

284. 94 P.2d 484 (Wash. 1939).

285. *Id.* at 484-85.

286. *Id.* at 485.

even though there was no violence or disturbance at the picket line.[287] As a result, the hotel filed a complaint with the Washington Department of Public Service, and the Department suspended the trucking companies' permits under which they operated for thirty days.[288] The trucking companies appealed, and the superior court affirmed the Department's order.[289] The trucking companies then appealed to the Washington Supreme Court.[290]

The Washington Supreme Court affirmed the Department's order.[291] The trucking companies argued that they were exempt from crossing the picket line pursuant to the tariff under which they were operating.[292] The tariff provided:

> Impractical Operation: Nothing in this tariff shall be construed as making it binding on carriers to pick up and/or deliver freight at locations from and to which it is impracticable to operate trucks on account of conditions of highways, roads, streets or alleys, or because of riots or strikes, or when loading or unloading facilities are inadequate.[293]

The issue, therefore, was whether it was "impractical" for the trucking companies to operate their trucks.[294] The court held that "'[i]mpractical,' as used in this tariff, clearly refers to the conditions at the picket line, and . . . the conditions there were not such as to make it impractical for the trucks to pass through."[295] Also, the trucking companies were not excused by operation of law because they were common carriers, and it was thus their duty "to send their trucks through the picket line."[296]

In *Luria Engineering Co. v. Aetna Casualty and Surety Co.*,[297] a general contractor sued a subcontractor for breach of contract when the subcontractor refused to perform, and the general contractor was required to hire a third party to complete the work at an increased

287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *See id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. 213 A.2d 151 (Pa. Super. Ct. 1965).

price.[298] The subcontractor argued that it was excused from performing because work on the project ceased as a result of a labor dispute, and when work resumed the price of materials had increased.[299] The court rejected the argument, however, finding that a labor dispute was foreseeable because there were five contractors and subcontractors at the site, and all but one employed union labor.[300]

In *Unitec Corp. v. Beatty Safway Scaffold Co.*,[301] the defendant entered into a contract with the plaintiff, under which the plaintiff promised to furnish and install, or erect scaffold for the defendant's benefit at the worksite where the defendant was performing subcontracting work.[302] The plaintiff's performance of its contract duties were interrupted, however, two days after it started work, when the plaintiff's employees refused to cross a picket line at the work site that was targeted against the defendant's non-union employees.[303] The defendant therefore performed a significant amount of the scaffolding work the plaintiff was contractually obligated to perform.[304] The plaintiff thereafter brought suit against the defendant for alleged payments due for the scaffolding work it had completed, and the defendant counterclaimed for breach of contract (for the scaffolding work the plaintiff had not completed).[305]

The district court, after trial, entered judgment in the plaintiff's favor.[306] On appeal, the Ninth Circuit agreed with the defendant that the picket line was "not a circumstance of objective impossibility," though it did not understand the plaintiff to be making this argument (the plaintiff asserted there was a contract modification).[307]

In *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*, the plaintiff was the general contractor on a construction project and entered into a contract with the defendant for the defendant to supply concrete for the project.[308] During the construction project, a picket line was maintained on the site until the project's completion.[309] During this

298. *Id.* at 152-53.
299. *Id.* at 152.
300. *Id.* at 154-55.
301. 358 F.2d 470 (9th Cir. 1966).
302. *Id.* at 473.
303. *Id.* at 473-74.
304. *Id.* at 473.
305. *Id.*
306. *Id.*
307. *See id.* at 474.
308. 310 N.E.2d 363, 364 (Mass. 1974).
309. *Id.*

time, the defendant refused to deliver concrete to the work site, despite many requests by the plaintiff.[310] The plaintiff then purchased the concrete from other sources at a price higher than the contract price with the defendant.[311]

The plaintiff sued the defendant for breach of contract and sought damages for an amount equal to the additional cost of the concrete and the expense of locating a different source.[312] The defendant argued that its non-performance was excused under the doctrine of impossibility of performance, and thus there had been no breach.[313] At trial, the plaintiff requested jury instructions that essentially provided that a failure to perform one's contract duties as a result of a particular event is not excused unless the contract provides that such an event is an excuse.[314] The plaintiff also requested an instruction stating that the defendant "was required to comply with the contract regardless of picket lines, strikes or labor difficulties."[315] If these instructions had been given it would have removed from the case the defendant's defense based on the doctrine of impossibility.[316] The trial court refused to give these instructions to the jury, the defendant took exception, and the jury returned a verdict in the defendant's favor.[317]

The plaintiff appealed from the adverse judgment, and argued that the trial court erred in refusing to grant the requested instructions.[318] The Supreme Judicial Court of Massachusetts first held that the trial court did not err in refusing to give the jury instructions that in effect provided that the doctrine of impossibility only applies when the particular event is set forth in the contract as an excuse.[319] The court held that "[t]his, in effect, requires a charge that no set of circumstances will ever excuse a supplier from performing."[320]

With respect to the jury instruction stating that the defendant "was required to comply with the contract regardless of picket lines, strikes or labor difficulties," the issue revolved around whether such labor activities could ever provide an excuse for the failure to perform a

310. *See id.*
311. *Id.*
312. *Id.*
313. *Id.* at 366.
314. *See id.* at 366 n.2.
315. *Id.* at 366.
316. *See id.*
317. *Id.* at 364.
318. *See id.*
319. *See id.* at 366 n.2.
320. *Id.*

contract duty.[321] The court noted that in some situations "[a] picket line might constitute a mere inconvenience and hardly make performance 'impracticable.'"[322] Also, in some situations, particularly those involving industries "with a long record of labor difficulties," such difficulties could be sufficiently anticipated at the time the contract was entered into.[323] But,

> [m]uch must depend on the facts known to the parties at the time of contracting with respect to the history of and prospects for labor difficulties during the period of performance of the contract, as well as the likely severity of the effect of such disputes on the ability to perform.[324]

The court concluded that "[w]here the probability of a labor dispute appears to be practically nil, and where the occurrence of such a dispute provides unusual difficulty, the excuse of impracticability might well be applicable."[325] Accordingly, the court held that the trial court did not err in refusing to provide the jury instructions requested by the defendant, and it was proper to admit the evidence of the strike.[326]

In *Monroe Piping & Sheet Metal, Inc. v. Edward Joy Co.*,[327] the defendant filed a counterclaim against the plaintiff for breach of contract.[328] The plaintiff was a subcontractor on the defendant's construction job, and had performed most but not all of its work.[329] The plaintiff argued that its failure to perform all of the work was excused because of a strike and picket line against the defendant at the construction site by the steamfitters' union.[330] The defendant, however, had established a reserve gate for the plaintiff's employees so they would not have to cross the picket line.[331] The court therefore held that it was proper for the trial court to grant the defendant summary judgment on its counterclaim because "[a]t best, plaintiff asserts that performance of the subcontract was difficult because of the strike; however, it has not

321. *Id.* at 366.
322. *Id.* at 367.
323. *See id.* at 367-68.
324. *Id.* at 368.
325. *Id.*
326. *See id.*
327. 526 N.Y.S.2d 279 (App. Div. 1988).
328. *Id.* at 280.
329. *Id.*
330. *Id.*
331. *Id.*

shown that performance was rendered impossible."[332] One judge dissented, without opinion, on the grounds that there was a triable issue of fact on the impossibility defense.[333]

D. Buyer Frustrating Seller's Performance

A fourth common scenario is when labor activity at the job site results in the defendant frustrating the seller's efforts to perform. In these cases, the seller fails to perform, and then sues, alleging (in essence) that its failure to perform should be excused because the defendant breached the contract's implied duty of good faith and fair dealing.[334] This implied duty prohibits a party from "interfer[ing] with or fail[ing] to cooperate in the other party's performance."[335]

In *Moore v. Whitty*,[336] the plaintiffs (partners) and the defendants entered into two contracts under which the plaintiffs promised to install tile, marble, and bathroom fixtures into two apartment building that were being built by the defendants, and the defendants promised to pay the plaintiffs for the work.[337] Prior to entering into the contracts, when the plaintiffs were asked to provide an estimate for the work, the plaintiffs told the defendants they would only provide an estimate if they could perform "under open shop principles."[338] The union representing workers at one of the apartment buildings had previously called a strike when the defendants used non-union labor for other work.[339] The plaintiffs, however, told the defendants that they had used non-union workers on other jobs where there were also union workers without trouble, and they believed they could do the same on this job.[340] When it came time to execute the contracts, the parties used a form contract that provided that union labor would be used for the work.[341] One of the plaintiffs pointed out the union labor provision to the defendants, and the

332. *Id.*

333. *Id.* (Callahan, J., dissenting).

334. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); U.C.C. § 1-304 (2001 revisions) ("Every contract or duty within [the Uniform Commercial Code imposes] an obligation of good faith in its performance and enforcement.").

335. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981).

336. 149 A. 93 (Pa. 1930).

337. *Id.* at 93.

338. *Id.*

339. *Id.* at 94.

340. *Id.* at 93.

341. *Id.*

clause was removed from both contracts.[342] The defendants alleged that they agreed to remove the clause in reliance on the plaintiffs' representation about being able to work at a site with union workers.[343]

But when the plaintiffs sought to perform, union officials representing workers at the job site told the defendants that if the plaintiffs' non-union workers were permitted to start work the union would call another strike.[344] In response, the defendants refused to permit the plaintiffs to perform under the contract, and had the work performed by union workers.[345]

The plaintiffs then sued the defendants for breach of contract, and sought damages.[346] The defendants argued that the union's threat to strike rendered performance of the contract, and defendants' performance, impossible, thereby excusing their non-performance.[347] The trial judge held that the defendants' evidence regarding the threatened strike was insufficient to excuse the defendants' non-performance,[348] and the trial resulted in verdicts in the plaintiffs' favor.[349]

The Pennsylvania Supreme Court affirmed.[350] The court first noted that because the union-worker clauses were stricken from the contract the plaintiffs were free to use non-union labor on the job.[351] The court also held that the plaintiffs' alleged statements about being able to work at a job site with union workers could not have been construed as a guarantee that they assumed responsibility for the union's threat to strike.[352] And because the parties had discussed the possibility of labor difficulties from the use of non-union workers, the defendants could not rely on the doctrine of impossibility to excuse non-performance.[353] The court also held that there was no showing that performance was impossible, because it had not been shown that the work could not have been completed without union workers, or that it would have been impossible to complete the work with union workers and non-union

342. *Id.*
343. *Id.* at 93-94.
344. *Id.*
345. *Id.* at 94.
346. *Id.* at 93.
347. *Id.* at 93-94.
348. *See id.* at 94.
349. *Id.* at 93.
350. *Id.* at 94.
351. *Id.* at 93.
352. *See id.* at 94.
353. *See id.*

workers.[354] Also, there was insufficient evidence of impossibility because there was at most a threat to strike, and not an actual strike.[355]

In *Oosten v. Hay Haulers Dairy Employees & Helpers Union*,[356] a dairy farmer and a creamery company entered into a contract for a term of just over seven months under which the dairy farmer promised to deliver milk to the creamery company, and the creamery company promised to purchase it.[357] A contract provision stated that

> [i]n case of strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved) . . . which shall render it *impossible* for seller to deliver, or buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party hereto.[358]

The creamery company's employees, who were unionized by the same union that had a dispute with the dairy farmer, refused to accept the milk at the union's demand.[359] A year before, the union had threatened to strike if the creamery company handled "hot" milk.[360] The employees refused to accept the milk despite a provision in the collective bargaining agreement between the union and the creamery company that there would be no strike during the agreement's term, and a provision stating that any dispute between them would be settled by a negotiation procedure that culminated (if necessary) in arbitration.[361] The collective bargaining agreement also provided that the company would not discriminate against any employees for "upholding the *principles* of the [union]."[362] The dairy farmer tried to sell his milk to other buyers at the market rate but could not because it was considered "hot."[363] The dairy farmer ended up selling it to a buyer at a rate below market price.[364]

The dairy farmer then sued the creamery company for breach of contract, and the creamery company argued that its non-performance

354. *Id.*
355. *See id.*
356. 291 P.2d 17 (Cal. 1955).
357. *Id.* at 19.
358. *Id.*
359. *See id.* at 19-20.
360. *Id.* at 21.
361. *Id.*
362. *Id.*
363. *Id.* at 23.
364. *Id.*

was excused under the contract provision regarding labor activity.[365] The trial court concluded that the creamery company's performance was not rendered impossible,[366] and the dairy farmer obtained a judgment of $20,314.19 against the creamery company.[367] The creamery company appealed, and the intermediate appellate court reversed, holding that the creamery company's performance was excused under the contract provision.[368]

On appeal to the California Supreme Court, the court held that the contract provision regarding "impossibility" should be construed consistent with the doctrine of impossibility, meaning the clause's import was to permit the creamery company to avoid having to establish that the labor activity was unanticipated.[369] The court then held that the trial court was justified in finding that the creamery company's performance was not rendered impossible.[370]

The court held that there was no evidence that the union would actually call a strike if the creamery company accepted the milk, except for the union's same threat a year earlier with respect to the handling of "hot" milk.[371] The court held that the trial court was not required to draw the inference that the union would strike based solely on that evidence.[372] Also, at no time did the creamery company tell the employees they would be terminated for refusing to handle the milk, and because the collective bargaining agreement included a no-strike clause, the company could expect the union and the employees to comply with the agreement.[373] Further, the company did not take any steps to settle the controversy with the union, despite the fact that the collective bargaining agreement included a dispute resolution procedure.[374] The court concluded that at most there was evidence as to what the employees might do, and it was speculative as to what they would actually do when confronted with potential discipline.[375] The trial court could have justifiably concluded that the company did no more than

365. *Id.* at 19.
366. *Id.* at 21.
367. *Id.* at 19.
368. *See* Oosten v. Hay Haulers Dairy Emps. & Helpers Union, 278 P.2d 744, 748 (Cal. Dist. Ct. App. 1955).
369. *See Oosten*, 291 P.2d at 20.
370. *Id.* at 21.
371. *Id.*
372. *Id.*
373. *See id.*
374. *See id.*
375. *See id.*

show "a vague threat of adverse action by [the union] and the employees, and that defendant was under no pressure other than its desire not to antagonize [the union]."[376] Further, the trial court was not required to find that the "principles" of the union included a boycott, and the company still could have used the dispute resolution procedure.[377]

Amici curiae argued that the union's activities were an illegal boycott under the Labor Management Relations Act of 1947, that such activities therefore could have been easily prevented by the company, and that an illegal act by a third party should not form the basis for a successful impossibility defense.[378] The court stated, however, that "[t]here is nothing in the case to indicate that the national law is here applicable. Hence there is no occasion to discuss the merits of this contention."[379]

The three dissenting justices asserted that the employees had refused to handle the milk despite a court order, the company's direct order to handle the milk, and the threat of discharge.[380] The justices believed that the company should not risk sustaining other losses by terminating the employees in addition to the losses it would suffer from the employees' refusal to handle the dairy farmer's milk.[381] They also stated that it was unrealistic to construe the contract provision, which was intended to protect a party from third-party labor disputes, as only providing protection if the party showed its action was just, particularly when the third party's legal rights in such a controversy might be uncertain.[382] They therefore concluded that the contract provision excused the company's non-performance.[383]

In *Fritz-Rumer-Cooke Co. v. United States*,[384] the plaintiff entered into a contract with the United States under which the plaintiff promised to remove and load certain railroad tracks at a particular plant by a specified date.[385] The contract did not include a provision protecting the plaintiff from any delay caused by a strike.[386] One week after the plaintiff started work, a strike of third-party employees took place at the

376. *Id.* (citation omitted).
377. *See id.*
378. *Id.* at 23.
379. *Id.*
380. *Id.* at 24 (Edmonds, J., dissenting).
381. *See id.*
382. *See id.*
383. *Id.* at 24-25.
384. 279 F.2d 200 (6th Cir. 1960).
385. *Id.* at 201.
386. *Id.* at 202.

plant and a picket line was established, which the plaintiff's employees observed.[387] As a result, the plaintiff completed the promised work after the specified date.[388] Although the United States excused the untimely completion of the work, the plaintiff sued the United States to recover damages allegedly caused by its work being interrupted by the strike.[389]

The plaintiff argued that in a construction contract the owner has an implied duty to provide the contractor with access to the work site.[390] However, the court rejected this argument, finding that the cause of the work interruption was the plaintiff's employees' refusal to cross the picket line, a matter over which the United States did not have control.[391] Also, the plaintiff's duty to continue working at the site would not be discharged based on "unforeseen difficulties, however great," and would only be discharged if "performance is rendered impossible by act of God, the law, or the other party."[392] The court therefore concluded that "the application of this rule required the contractor to complete his undertaking without right of recovery for any damages that may have been sustained."[393]

IV. ANALYSIS OF THE DOCTRINE OF IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE IN CASES INVOLVING LABOR ACTIVITY

As previously discussed, impossibility or impracticability of performance cases involving labor activity fall into the following categories: (1) cases in which the seller of goods or services fails to perform because of a strike by its employees; (2) cases in which the seller of goods or services fails to perform because of a strike at a third-party supplier, which made it difficult for the seller to obtain the materials or means to perform; (3) cases in which the seller of goods or services fails to perform because of a picket line at the place of delivery, which is honored by the seller or its employees; and (4) cases in which the buyer frustrates the seller's ability to perform by refusing to cooperate with the buyer's performance because a union has threatened to strike. Each of these issues is analyzed below, along with an

387. *Id.* at 201.
388. *Id.*
389. *Id.*
390. *See id.*
391. *Id.*
392. *Id.*
393. *Id.* at 202.

introductory discussion of the role of force majeure clauses in such cases.

With respect to each discussion, an emphasis is provided on the role of federal labor policy. As will be seen, instances arise in which factual questions relevant to the doctrine of impossibility or impracticability of performance implicate issues normally reserved for determination by the NLRB. In such instances, it will be necessary to determine whether a court should be precluded from resolving those questions.

A. The Role of Force Majeure Clauses

An important issue in any of the above situations is the existence of a force majeure clause in the contract. To the extent a force majeure clause is included that refers to strikes or other labor activity as an excuse for nonperformance, these clauses are usually drafted with little attention to detail. For example, the parties usually fail to specify whether the clause is intended to incorporate established impracticability analysis (to the extent there is such a thing), or is intended to apply a stricter standard that only excuses performance that is in fact impossible (a *Paradine* standard). The parties also fail to clearly specify the specific situations in which a strike or labor dispute will excuse performance. Thus, although one might believe that a force majeure clause referring to strikes or other labor disputes would make for any easy case, it usually does not.

Of course, if the parties include such a clause, this will avoid the non-performing party from having to demonstrate that the absence of labor activity was a basic assumption on which the contract was made. This is important because in many situations the possibility of labor activity will be deemed sufficiently foreseeable such that the doctrine of impracticability will not be available. Of course, as shown in *S.A. Ghuneim & Co. v. Southwestern Shipping Corp.*, the inclusion of a force majeure clause that does not refer to strikes or other labor activity could suggest that parties did not intend such activity to excuse non-performance.[394]

If the parties use a particular term to describe when labor activity will excuse non-performance, and the term is broader than "impracticability," the non-performing party might be more limited than usual in demonstrating that non-performance is excused. Thus, in *Bristol Township School District v. Ryder Transportation Services*, for

394. *See* 124 N.Y.S.2d 303, 307 (Sup. Ct. 1953).

example, the parties used the word "prevented," which the court found was not synonymous with "impracticable."[395] Similarly, in *Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, the court held that a seller's non-performance was not excused under a contract provision when performance became more expensive because the provision used the term "*prevent* shipment."[396] But this is not always the case. For example, in *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, the court held that the term "impossible" would be construed consistent with the impossibility doctrine (which includes "impracticability").[397]

Otherwise, however, the issues involved in the use of a force majeure clause when non-performance occurs because of labor activity are generally no different from any other impracticability case. But because provisions excusing non-performance as a result of a strike are common,[398] a failure to include such a provision can be used as evidence that the parties did not intend such an event to be an excuse.[399] Also, as the court noted in *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*, in some situations, particularly those involving industries "with a long record of labor difficulties," such difficulties could be sufficiently anticipated at the time the contract was entered into.[400] But this will not always be the case, as shown by the decision in *Badhwar v. Colorado Fuel and Iron Corp.*, which noted that often contracts are drafted in haste.[401] Thus, in that case the failure to include a force majeure clause referring to strikes was not used as evidence that the parties did not intend labor activities to excuse non-performance.[402]

The issues involving the use of a force majeure clause do not conflict with, and should not be influenced by, federal labor policy. Of course, to the extent two parties foresee the possibility of a strike, and agree that either party's performance will be excused as a result of that activity, the contract can frustrate a union's efforts to inflict as much economic harm on the target of the strike. But in such a situation, the

395. Civ. A. 93-5983, 1995 WL 116673, at *3 (E.D. Pa. Mar. 20, 1995) (explaining that there are a multitude of non-economic activities that could have "prevented" or stopped contract performance while the economic impracticability standard is narrower).

396. *See* 148 F. 594, 598 (4th Cir. 1906) (emphasis added).

397. 291 P.2d 17, 20 (Cal. 1955) (emphasis added).

398. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981) (noting that parties often provide in their contracts for the eventuality of a strike).

399. *See* S. A. Ghuneim & Co. v. Sw. Shipping Corp., 124 N.Y.S.2d 303, 307 (Sup. Ct. 1953).

400. *See* 210 N.E.2d 363, 367-68 (Mass. 1974).

401. *See* 138 F. Supp. 595, 607 (S.D.N.Y. 1955), *aff'd*, 245 F.2d 903 (2d Cir. 1957).

402. *See id.* ("[W]here the parties themselves have not allocated responsibility [with a force majeure clause], justice is better served by appraising all of the circumstances, the part the various parties played, and thereon determining liability.").

seller is already being harmed as a result of the clause. Because the parties are taking into account the possibility of the seller's failure to perform, the price for performance has already been reduced. Prohibiting such clauses would simply result in an increase in the price of the service or goods, with the economic harm to the seller occurring during the strike.

B. Seller Cannot Perform Because its Employees Go on Strike

Several issues specifically related to federal labor policy are involved with the situation in which a seller cannot perform because its employees go on strike. Each of these is discussed below.

1. Fault with Respect to Strike

With respect to a strike by the seller's employees, the strike must, of course, not be the seller's fault.[403] If it is, non-performance was the seller's fault, and the strike would therefore not be an excuse.[404] Determining whether a strike is the employer's fault is complicated by two factors. First, fault is a concept that is not easy to apply. The standard definition of fault is "[a]n error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith or mismanagement."[405] Accordingly, whether a strike was the employer's fault will be difficult to determine even when the facts are undisputed.

Some cases, however, will be easy. Thus, the defense of impracticability would be unavailable if the strike was an unfair labor practice strike (i.e., a strike in response to the employer's unfair labor practices).[406] In such a situation, the seller was at fault for the event that made performance impracticable because the seller's breach of a legal duty imposed by federal law was the cause of the strike.

But the issue will be more complicated when the strike is an economic strike, caused by the employer and the union not reaching an

403. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) (providing the defense of impracticability only applying when the promisor's performance is made impracticable "without his fault").

404. *See id.* (providing that the defense of impracticability only applies when promisor's performance is made impracticable "without his fault").

405. BLACK'S LAW DICTIONARY 683 (9th ed. 2009).

406. *See, e.g.*, WILLISTON & THOMPSON, *supra* note 3, at § 1951A n.7 (providing that a contractor was at fault when he failed to pay wages and there is a duty to do best efforts to yield strikers, especially when the strike was the "consequence of his own wrong").

agreement on the terms of a labor contract. In such a situation, the employer did not breach any legal duty.[407] Under federal labor law, an employer is only required to bargain in good faith, and is not required to agree to any particular union demands.[408] Can an economic strike still be the employer's fault in the sense used in the law of impracticability? It seems unlikely.

If an employer has the right to engage in hard bargaining to try and obtain a labor contract that is favorable to it, it would be strange to consider the resulting strike the employer's fault. "Fault" suggests some sort of unreasonable action, and the law traditionally has taken the position that a party to contract negotiations is in the best position to determine whether a contract is advantageous to it.[409] Accordingly, courts generally do not assess the adequacy of consideration.[410] Therefore, an economic strike cannot be considered an employer's "fault," no matter how unreasonable it might be thought the employer acted at the bargaining table. If the defendant proves that the union struck for economic reasons, the defendant should be found to have carried its burden of establishing that the event that allegedly caused non-performance was not its fault. Note that this has nothing to do with a concern that courts would become involved in matters of federal labor policy. Rather, it is based on the notion that a party who refuses to enter into a contract with another party because it does not find the proposed terms favorable, cannot be considered to have acted unreasonably.[411]

But the fact that an unfair labor practice strike (as opposed to an economic strike) *is* the employer's fault raises the issue of whether a federal or state court in a breach-of-contract action is permitted to determine whether a strike was in fact caused by an unfair labor practice. In such a situation, the defendant, in an effort to establish each of the elements of the impracticability defense, will seek to prove that it did not commit an unfair labor practice, and in response, the plaintiff will introduce evidence showing that the defendant did commit an unfair

407. *See* 29 U.S.C. § 158(d) (2006) ("[B]ut such obligation does not compel either party to agree to a proposal or require the making of a concession.").

408. *See id.*

409. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c ("Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions.").

410. *See* Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 542 (Ohio 1991) (citing Judy v. Louderman, 29 N.E. 181, 183 (Ohio 1891)).

411. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 261 (providing that the defense of impracticability applies when the promisor's performance is made impracticable "without his fault").

labor practice. And under the *Garmon* preemption rule, when an activity that a federal court or a state seeks to regulate is arguably prohibited by the NLRA, federal and states courts are usually required to defer to the NLRB's exclusive jurisdiction.[412] Thus, a federal or state court might be precluded from resolving the issue.

As an initial matter, it is important to keep in mind that a conclusion that a court is not permitted to inquire into whether the strike was an unfair labor practice strike does not resolve what effect such a conclusion has on the breach of contract case. Two different effects are possible. First, if a court were prohibited from inquiring into whether the defendant's failure to perform was caused by an employer unfair labor practice, the defendant could be found unable to rely on the defense of impracticability. The defendant has the burden of establishing each element of the defense,[413] and thus the defendant could be held unable to prove that the event that caused non-performance was not its fault. Second, the court could conclude that the "no fault" element will be presumed to have been established by the defendant.

This issue need not be resolved, however, because a court should not be precluded from inquiring into whether the strike was an unfair labor practice strike. When a court rejects a defense of impracticability because the defendant's unfair labor practice caused the strike, the court is not seeking to regulate activities prohibited by section 8 of the NLRA. Rather, the court is simply imposing liability against the defendant for violating a duty imposed by state law (the duty to comply with contract duties or pay a compensatory sum), and not permitting the defendant to escape liability because it can also be found liable under federal labor law for its conduct that rendered the impracticability defense unavailable.

Also, deference to the exclusive jurisdiction of the NLRB is unnecessary "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility."[414] Providing compensation for the breach of a contract

412. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959) (citing Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 489-491 (1953); Weber v. Anheuser-Busch, 348 US 468, 479 (1955)).

413. *See* E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975) ("The burden of proving each element of claimed commercial impracticability is on the party claiming excuse.") (citing Ocean Air Tradeways, Inc. v. Arkay Realty Corp., 480 F.2d 1112, 1117 (9th Cir. 1973)).

414. *Garmon*, 359 U.S. at 243-44 (citation omitted).

is certainly an interest "deeply rooted in local feeling and responsibility," and the state has an overriding interest in protecting its residents from the breach of a contract.[415] In fact, the enforcement of contracts is considered to be one of the fundamental responsibilities of the government,[416] and the enforcement of contracts even when the promisor had not acted at all (i.e., nonfeasance, not misfeasance) dates back to the early sixteenth century.[417] Of course, if the court were inclined to reject the defense of impracticability in the event of preemption, the interest at stake would be the defendant's interest in avoiding liability when its non-performance would ordinarily be excused. This interest, however, is also deeply rooted in local feeling and responsibility. As previously discussed, the modern defense of impracticability dates back to the nineteenth century. Accordingly, a federal or state court should not be prohibited from deciding whether a strike was an unfair labor practice strike or an economic strike for purposes of determining whether the defense of impracticability applies.

Such a conclusion is supported by the Supreme Court's decisions in *Linn v. United Plant Guard Workers Of America, Local 114*[418] and *Farmer v. United Brotherhood of Carpenters, Local 25*.[419] In these cases, the Court held that a defamation claim and an intentional infliction of emotional distress claim, respectively, were not preempted.[420] The Court first relied on the fact that the tortious conduct was not protected by the NLRA, and thus there was no risk that a court would regulate conduct Congress intended to protect.[421] Second, the state had an overriding interest in protecting its residents from the alleged tortious conduct, and the state interest was "deeply rooted in local feeling and responsibility."[422] Third, there was little chance of a conflict with federal labor policy because the elements of the tort claims

415. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983); *Garmon*, 359 U.S. at 243-44.

416. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at IX (1974) (noting that the functions of a minimal state would be "protection against force, theft, fraud, enforcement of contracts, and so on").

417. *See* JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON & DOUGLAS G. BAIRD, CONTRACTS: CASES AND COMMENT 193 (9th ed. 2008); *see also* Belknap, Inc. v. Hale, 463 U.S. 491, 511 (1983) (holding that the state "surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm").

418. 383 U.S. 53 (1966).

419. 430 U.S. 290 (1977).

420. *See Farmer*, 430 U.S. at 305; *Linn*, 383 U.S. at 61.

421. *See Farmer*, 430 U.S. at 302; *Linn*, 383 U.S. at 61 (citing Md. Drydock Co. v. NLRB, 183 F.2d 538, 540 (4th Cir. 1950)).

422. *See Farmer*, 430 U.S. at 302; *Linn*, 383 U.S. at 61-62.

were different from the elements of an unfair labor practice.[423] Fourth, the NLRB lacked the authority to provide the plaintiff with the damages or other relief sought under the state claim.[424] Fifth, the court would be unconcerned about the labor context of the case and would have power to award relief only if the conduct was tortious (as opposed to a violation of the NLRA), and the state claim could therefore be resolved without addressing the unfair labor practice issue.[425]

A review of the factors relied on in *Linn* and *Farmer* shows that more of the factors support the conclusion there should not be preemption. First, a breach of contract is not protected by the NLRA.[426] In fact, the Labor Management Relations Act promotes the enforceability of promises, providing for a federal cause of action for the breach of a collective bargaining agreement.[427] Second, as previously discussed, the state has an overriding interest in protecting its residents from the breach of a contract.[428] Third, the NLRB does not have the authority to award breach of contract damages.[429] Fourth, the court would be primarily concerned with whether the defendant's conduct was a breach of contract, and the unfair labor practice issue would only arise as part of a defense to the claim.[430]

Unlike *Linn* and *Farmer*, however, the court would be required to determine if the defendant committed an unfair labor practice. Thus, the breach of contract action could not "be adjudicated without regard to the merits of the underlying labor controversy."[431] But this factor alone should not result in preemption. The Supreme Court has noted that "inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."[432] Also, in such cases, the plaintiff's claim will not be premised on the defendant's unfair labor practice.[433] Rather, the plaintiff's claim is premised on the defendant

423. *See Farmer*, 430 U.S. at 304; *Linn*, 383 U.S. at 63.

424. *See Farmer*, 430 U.S. at 304; *Linn*, 383 U.S. at 63.

425. *See Farmer*, 430 U.S. at 304; *Linn*, 383 U.S. at 63-64.

426. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983).

427. *See* 29 U.S.C. § 185(a) (2006).

428. *See Belknap*, 463 U.S. at 512.

429. *See* 29 U.S.C. § 160(c).

430. *See Belknap*, 463 U.S. at 500-12.

431. *Farmer*, 430 U.S. at 300 (citing UAW v. Russell, 356 U.S. 634, 649 (1958) (Warren, C.J. dissenting)).

432. *Id.* at 302.

433. *See, e.g.*, Bristol Twp. Sch. Dist. v. Ryder Student Transp. Servs., Inc., No. Civ. A. 93-5983, 1994 WL 440236, at *2 (E.D. Pa. Aug. 12, 1994).

non-performance of its contract duty.[434] The unfair labor practice issue only arises as part of a defense, and not as part of the plaintiff's claim.[435] Although the Court in *Amalgamated Association of Street Employees v. Lockridge*[436] held that a state breach of contract claim was preempted when the claim was based on a union member's allegation that the union has breached its constitution with its members,[437] that case is distinguishable. In *Lockridge*, the breach of contract claim was based on a contract between a union and its members, and thus the potential interference with labor policy was much greater.[438] In a situation in which the unfair labor practice issue only arises because the defendant asserts a defense to the breach of contract claim, the state "regulation" of the conduct prohibited by federal labor law is much weaker.[439]

Also, "[t]he primary jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so."[440] Although any person is permitted to file an unfair labor practice charge,[441] a party asserting a breach of contract claim will usually not have a reasonable opportunity to invoke the Board's jurisdiction. When the defendant breaches the contract, it might not even be known that the defendant will rely on the doctrine of impracticability as a defense. Also, it is unlikely that the plaintiff will have sufficient information to reach a conclusion as to whether the strike was due to an unfair labor practice by the defendant. Of course, if an unfair labor practice complaint has been issued, the court should defer to the Board's jurisdiction on the issue of whether the strike was an unfair labor practice strike.[442]

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434. *Id.*

435. *Id.* at *2, *4 (Defendant argued that its nonperformance was excused by a contract provision which specified that it would not be liable for failure to perform if such performance was "prevented" by labor disputes. Plaintiff was required to demonstrate that the defendant engaged in unfair labor practices to prevail on its breach of contract claim.).

436. 403 U.S. 274 (1971).

437. *See id.* at 293.

438. *See id.* at 277.

439. *See id.* at 291-93.

440. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 201 (1978).

441. GORMAN & FINKIN, *supra* note 112, at 10.

442. *See* Makro, Inc. (Loehmann's Plaza I), 305 N.L.R.B. 663, 670 (1991) (finding that preemption with respect to state action asserting trespass occurs when unfair labor practice complaint is issued), *rev'd on other grounds on rehearing*, Makro, Inc. (Loehmann's Plaza II), 316 N.L.R.B. 109 (1995).

2. Efforts to Settle the Strike

Another issue is whether the strike rendered performance impracticable. An important issue in such cases will likely be whether the seller could have settled the strike. As the Second Restatement comment notes, "a party is expected to use reasonable efforts to surmount obstacles to performance, and a performance is impracticable only if it is so in spite of such efforts."[443] Also, the Second Restatement comment provides that "[a] mere change in the degree of difficulty or expense due to such causes as increased wages . . . unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover."[444] If the seller could have settled the strike without "excessive cost," performance was not impracticable, which in turn raises the issue of whether such an inquiry is permissible. As previously discussed, under the NLRA an employer is not required to concede to any union demand, and is simply required to bargain in good faith.[445]

In *Bristol Township School District v. Ryder Transportation Services*, as previously discussed, the court refused to permit a fact finder to determine whether the transportation company could have settled the strike and thus performed its contractual duty.[446] The court concluded that any economic analysis was precluded.[447] Thus, whereas in the past an argument that it would be expensive to perform would be met with judicial hostility, in *Bristol* the transportation company's argument that its refusal to concede to the union's wage demands was treated as unassailable.[448] This approach was likely based both on the increasing receptiveness to impracticability arguments (otherwise the transportation company's position could have been rejected outright, and thus still without any inquiry in the company's negotiations), and the concerns regarding a conflict with federal labor policy. As noted by Williston, "[t]he trouble with approaching the problem upon this basis [whether the strike could have been settled] is that it places upon the court the burden of determining the issues of the strike, a task now

443. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981).

444. *Id.*

445. *See* 29 U.S.C. § 158(d) (2006).

446. *See* Bristol Twp. Sch. Dist. v. Ryder Student Transp. Servs., No. Civ. A. 93-5983, 1994 WL 440236, at *4 (E.D. Pa. Aug. 12, 1994).

447. *See id.*

448. *See id.*

confined to administrative tribunals."[449] Of course, the court could have held that its refusal to inquire into the employer's ability to end the strike meant that the defendant could not establish its impracticability defense, but the court chose not to take that approach.

In cases such as *Bristol*, a court should be free to determine whether the seller could have settled the strike at a price that would not render performance unduly costly. Being required to pay employees a higher wage is no different from the market price for needed materials rising. The seller is not required under the NLRA to pay employees any particular wage (any more than it is required to purchase necessary materials), but a failure to do so when the labor or the goods can be purchased at a price that is not excessive should not excuse non-performance. Also, as previously noted, providing compensation for the breach of a contract or avoiding liability when performance was impracticable are interests "deeply rooted in local feeling and responsibility."[450]

An objection can be raised, however, that a court would be prohibiting conduct that Congress intended to be unregulated. For example, the Supreme Court has held that a state cannot prohibit economic weapons that Congress intended an employer or union to be free to use against each other.[451] But a refusal to permit a defendant to rely on the defense of impracticability when it could have resolved the strike at a cost that would be insufficient to ordinarily establish the defense, does not sufficiently penalize the defendant's refusal to concede to the union's demands. For example, a contract duty is often considered simply a promise to perform or to pay a compensatory sum to the promisee.[452] If that is so, a court is not punishing the defendant, but simply requiring the promisor to perform one of its two options.

In fact, if a court refused to consider the matter, and still permitted the defendant to proceed with its impracticability defense, it would harm the effectiveness of the union's strike weapon. And this would be

449. WILLISTON & THOMPSON, *supra* note 3, § 1951A, at 5466 n.7.

450. *See* Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 296 (1977).

451. Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 147, 149 (1976).

452. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.").

inconsistent with the NLRA's goal of raising employee wages.[453] If a court refused to consider the matter and then refused to permit the defendant to proceed with its impracticability defense, it would reduce the employer's bargaining power with the union. Although this approach might be consistent with the NLRA's goal of raising employee wages, it would still constitute taking a position that would have an effect on labor relations.[454]

Accordingly, while at first glance a refusal to consider the matter might be construed as the court removing itself from the labor issues involved, such a decision will in fact result in the court strengthening either the employer or the union with respect to their bargaining positions. In fact, the neutral approach would be one in which the court inquires into whether the strike could have been settled at a reasonable price. If the court approaches the matter like any other case involving the defense of impracticability, and treats the failure to purchase the needed labor as no different from a failure to purchase needed materials, neither union nor employer will be provided with a bargaining advantage.

Also, as the Supreme Court stated in *Belknap, Inc. v. Hale*,[455]

> [i]t is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.[456]

In fact, the Court referred to such a scenario as a "lawless regime."[457]

3. Use of Replacement Workers

Another important issue regarding whether performance was impracticable is whether the seller could have employed replacement workers to perform the work. Interestingly, and involving a recognition of the unique aspects of a labor dispute, the court in *Bristol* held that it was a disputed issue of fact as to whether the failure to use replacement workers was reasonable based on a fear of picket line violence.[458] This

453. *See* 29 U.S.C. § 151 (2006).
454. *See id.*
455. 463 U.S. 491 (1983).
456. *Id.* at 500.
457. *Id.*
458. *See* No. Civ. A. 93-5983, 1994 WL 440236, at *5 (E.D. Pa. Aug. 12, 1994).

inquiry poses no conflict with federal labor policy. Although a party is not required to hire replacement workers, there is no right under the NLRA to refuse to hire replacement workers, and there is no duty to hire replacement workers. Also, inquiring into whether the defendant could have hired replacement workers does not penalize the defendant for using an economic weapon, but perhaps only for not using the weapon.

4. Federal Labor Policy

A significant issue for purposes of this Article, however, is whether federal labor policy should play a role in determining whether a seller's non-performance should be excused. When a seller fails to perform a contract duty a loss occurs, and the loss could be significant, particularly if the buyer suffers consequential damages. The question is who should bear the risk of that loss.

To the extent the buyer bears the risk of the loss, the seller's financial harm will be limited to the lost profit from the sale, but it will not be responsible for compensating the buyer for its damages.[459] Of course, the seller will still suffer harm, because it will lose its potential profit, and its reputation with the buyer (and other customers or prospective customers) might be harmed, leading to reduced business in the future. But if the seller bears the risk of the loss, the seller will be required to compensate the buyer.[460] Accordingly, if courts routinely hold that a seller's non-performance is not excused due to a strike by its employees, a union's strike effort will tend to cause more economic harm to the employer, and will thus be more likely to be successful.

The issue arises then, whether courts should take these effects into account when deciding impracticability cases based on strikes by the seller's employees. To the extent the doctrine of impossibility or impracticability of performance is an implied-in-law term, and thus imposing values external to the contract, a court could presumably look to federal labor policy to assist in deciding these cases. The more prudent approach, however, is for federal and state courts bit to take federal labor policy into account. Courts are not well equipped to make federal labor policy, and it was Congress's intent that the NLRB formulate federal labor policy.[461]

459. *See* U.C.C. § 2-509(4) (2010) (implicitly stating that parties are always free to specify which party allocates the risk of loss in the contract).

460. *See id.* § 2-713(1)(a).

461. *See* O'Gorman, *supra* note 126, at 184-86.

C. Seller Cannot Perform its Duties Because of Strike by Third Party

Although the Restatement and the UCC anticipate situations in which a "severe shortage of raw materials or of supplies" will excuse a seller's non-performance,[462] courts have been reluctant to recognize an impracticability defense when the seller's non-performance is caused by a third-party strike.[463] As noted by the court in *De Grasse Paper Co. v. Northern New York Coal Co.*, an inability to perform in such situations might often be the result of a failure by the seller to enter into a contract with a supplier to ensure receipt of the necessary goods or material despite a shortage of supply.[464] Such a holding is consistent with the efficiency theory of impracticability. The seller could have avoided the loss at a cheaper cost than the buyer. The seller had the ability to enter into a contract with the supplier to ensure the availability of the goods or materials. Also, the seller is the cheaper insurer because it will usually have greater access to information concerning the possibility of labor disputes between its suppliers and employees.

Also, although the court in *Samuel H. Cottrell & Son v. Smokeless Fuel Co.* focused on the court's force majeure clause, one senses a reluctance to excuse non-performance simply because of a rise in the price of necessary materials as a result of the strike.[465] Such a holding is consistent with the UCC's statement that "[n]either is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover."[466] The Second Restatement comments similarly state that "[a] mere change in the degree of difficulty or expense due to such causes as increased . . . prices of raw materials . . . unless well beyond the normal range, does not amount to impracticability since it is the sort of risk that a fixed-price contract is intended to cover."[467]

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462. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981) ("A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section."); U.C.C. § 2-615 cmt. 4 ("[A] severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.").

463. *See, e.g.*, De Grasse Paper Co. v. N. N.Y. Coal. Co., 179 N.Y.S. 788, 789-90 (App. Div. 1919).

464. *See id.* at 790.

465. 148 F. 594, 598 (4th Cir. 1906).

466. U.C.C. § 2-615 cmt. 4.

467. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d.

Further, because "a party is expected to use reasonable efforts to surmount obstacles to performance,"[468] the seller is expected to look to alternative suppliers. Accordingly, as demonstrated in *S.A. Ghuneim & Co. v. Southwestern Shipping Co.*, if the goods are available from other suppliers, non-performance will not be excused.[469]

Accordingly, non-performance in such situations will likely be limited to those in which the seller acted promptly after entering into the contract with the buyer to secure a contract with the supplier. Also, even if a court was inclined to excuse the seller even when the seller had not secured such a contract, the labor activity would have to be unanticipated (always a requirement), and the goods would have to be either unavailable from any supplier or have reached an extremely high price.

Because the labor activity at issue is that of a third party, no issues of federal labor policy should arise. Accordingly, the NLRA will likely not play a role in such cases.

D. Non-performance Owing to Picket Line at Place of Delivery

A third common scenario in which a seller fails to perform because of labor activity is when the seller, or its employees, refuses to cross a picket line at the place of delivery. As the court in *Consolidated Freight Lines, Inc. v. Department of Public Service* made clear, a fear of picket line violence will be insufficient grounds for a buyer to refuse to have its employees cross the picket line, in the absence of any evidence supporting the fear.[470] But as was seen over forty years later in *Bristol Township School District v. Ryder Transportation Services*, with respect to the fear of using replacement workers due to anticipated violence, modern courts might be more receptive to such an argument.[471] The court in *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*, by affirming the trial court's refusal to instruct the jury that strikes or labor difficulties never excuse performance, acknowledged that in some situations a picket line at the place of delivery can be a basis for excusing non-performance.[472] But as *Monroe Piping & Sheet Metal, Inc. v. Edward Joy Co.* shows, if the buyer establishes a reserve gate to be used by non-employees, and the reserve gate cannot be picketed by

468. *Id.*
469. *See* 124 N.Y.S.2d 303, 306-07 (Sup. Ct. 1953).
470. *See* 94 P.2d 484, 485 (Wash. 1939).
471. *See* No. Civ. A. 93-5983, 1995 WL 116673, at *4-5 (E.D. Pa. Mar. 20, 1995).
472. 310 N.E.2d 363, 367-68 (Mass. 1974).

the union under the NLRA's prohibition on secondary activity, performance is not impracticable because the reserve gate can be used.[473]

With respect to a situation in which non-performance is due to a seller's employees' refusal to cross a picket line, the non-performance must, of course, be impracticable. In this respect, whether the seller could have compelled its employees to cross the picket line is relevant. Relevant to this determination will be whether the employees' refusal to cross the picket line is protected activity under the NLRA.

State and federal courts should be free to make this assessment. If the employees' activity was not protected by the NLRA, the employer should be required to threaten appropriate disciplinary action. Although this will require a federal or state court to pass on whether employees' conduct was protected by the NLRA, as previously discussed, providing compensation for the breach of a contract is certainly an interest "deeply rooted in local feeling and responsibility."

Federal labor policy can play a role in such cases in another way. If the seller's non-performance is excused, it will be less likely to take action against its employees in an effort to compel the deliveries, and it will not be required to pay any resulting damages to the buyer. If the seller's non-performance is not excused, it will be likely to threaten the employees with discipline, and will also be liable for any resulting damage to the buyer. Accordingly, excusing the seller's non-performance will be beneficial to labor. It will encourage the honoring of picket lines, and inflict financial harm on the buyer (the target of the picket line) because it will not have any right to compensation for the seller's non-performance. But, as previously discussed, because federal courts and state courts are not well suited to determining or implementing federal labor policy, such issues should not be addressed by the courts.

E. Buyer Frustrating Seller's Performance

When a buyer refuses to permit the seller to perform promised work on its premises, or refuses to accept goods, because of a union's threat to strike, courts have been reluctant to permit this to excuse the buyer's cooperation with the seller's performance. In these situations, the seller could not act based on a simple threat to strike, particularly when the collective bargaining agreement includes a no-strike clause. But a mere picket line at the work site will not constitute the buyer frustrating the

473. 526 N.Y.S.2d 279, 280 (App. Div. 1988).

seller's performance.

These cases could potentially involve important matters of federal labor policy. To the extent a buyer is not excused as a result of a union threat to strike, and instead must test the union's threat, this could lead to the very industrial strife the NLRA was designed to prevent. Accordingly, in such a situation, a court should be cautious in rejecting a buyer's argument that it failed to cooperate with the plaintiff's performance due to a threatened strike.

V. CONCLUSION

Over the years, as courts have become more receptive to the defense of impossibility or impracticability of performance, they have been more willing to find that strikes and other labor activity excuse non-performance. At the same time, however, Congress has removed the authority of federal and state courts to resolve labor law issues. Thus, the potential for a clash between state contract law and federal labor policy has arisen. In deciding these cases, courts should refrain from reaching a decision that in any way seeks to develop labor policy, a role reserved for the NLRB. But as demonstrated above, courts should not hesitate to scrutinize a party's alleged excuse for non-performance based on impracticability or impossibility simply because federal labor law issues are involved.